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The Terror Court Assemblage – Two Case Studies from India

Thesis Submitted for the Degree of PhD in Law
SOAS, University of London

Hanns B Kendel

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i. Abstract

The challenge of defining terrorism has long preoccupied domestic and international lawyers alike. The rising presence of the terrorist on the global stage has muddled the lines between security, politics and law leaving the courts to solve intricate puzzles and maintain delicate balances. All the while people and states have engaged in ever more heated arguments and ever more stringent policies to tackle a phenomenon the heart of which remains opaque. Presupposing definitions as linguistic/legal reflections of essential realities is misleading and conceals the role played by legal processes in creating terrorist realities.

Developing a theoretical and methodological toolkit drawing on Assemblages and Actor Network Theory this thesis traces the stabilisation of two concrete terrorists through a Terror Court Assemblage (TCA). Deploying a slow ethnographic method of tracing actors through interviews, participant observation and judgment analysis the argument is that the terrorist is made through intricate and contingent processes of stabilisation and choreography. When successful the choreography of actors in the TCA produces a naturalised terrorist whose participation in the carrying of the concept of terrorism is crucial. Against a backdrop of fuzzy, heterogeneous and fluid relations the terrorist emerges out of the successful Terror Court Assemblage as a stable and very real (arte)fact articulated by a smooth chain of reference. Understanding the terrorist as a processually stabilised entity made to speak by an intricate TCA does nothing in itself to diminish the impact of terrifying incidents. However tracing the terrorist as a product of judicial processes and translations rather than as their input permits a critical appraisal of debates surrounding agreed definitions of terrorism as red herrings and opens new vantage points on where intervention is most promising.

ii. Table of Contents

i. Abstract.....	3
ii. Table of Contents	4
iii. Abbreviations.....	9
iv. Table of Statutes	11
From India.....	11
From the Rest of the World	11
United Nations Security Council Resolutions.....	11
v. Table of Cases	12
Cases From India.....	12
Not Published in Print:	13
Nasir Sessions Court:	13
Nasir High Court:	13
Aftab Sessions Court:	13
Aftab High Court:	13
Kasab Sessions Court:.....	14
Chapter 1 - Introduction.....	15
1.1 Field Diary Entry: 20/03/13 10:00	15
1.2 A Few Preliminary Remarks	15
1.3 Field Diary Entry: 20/03/13 10:15	16
1.4 Context.....	17
1.5 Field Diary Entry: 20/03/13 10:30	19
1.6 Argument.....	20
1.7 Field Diary Entry: 20/03/13 10:45	24
1.8 Reader Relevance.....	25
1.9 Field Diary Entry: 20/03/13 11:00	26
1.10 Literature Relevance.....	27
1.11 Field Diary Entry: 20/03/13 11:15	31
1.12 Methodological Relevance.....	31
1.13 Field Diary Entry: 20/03/13 11:30	33
1.14 Plan.....	33
1.16 Field Diary Entry: 20/03/13 11:45	36
1.17 Wider Outlook & Link Chapter II.....	36

Chapter 2 – Assemblage Thinking and the Terror Court	
Assemblage	38
2.1 Terrorist Assemblages.....	38
2.2 Actor Network Theory	39
2.2.1 Relational Materiality and the Anchoring Chain of Reference	39
2.2.2 Performativity and <i>Vincula Juris</i>	41
2.2.3 Translation.....	43
2.2.4 Relational Materiality and Performativity Translated.....	46
2.2.5 Critiques and Limitations of ANT.....	50
2.3 Totalities and Assemblages	56
2.3.1 Relations of Interiority and Exteriority	57
2.4 The Tools Of The Assemblage	59
2.4.1 Territorialisation.....	59
2.4.2 Coding/Decoding.....	61
2.5 The Window on the Assemblage – Last Stop before the Terror	
Court Assemblage.....	62
2.5.1 Emergent Properties.....	63
2.5.2 Material Components	65
2.5.3 Expressive Components	65
2.5.4 Irreducible and Decomposable	65
2.5.5 What Assemblages Don't Do and Why They Matter After All	66
2.6 The Terror Court Assemblage.....	68
2.6.1 The TCA And Its Application In India	68
2.6.2 The Final Tools of the TCA	72
2.6.3 The TCA and the Link to India	74
2.7 The Judgment Between Expressive And Material Components.....	77
2.7.1 Here, There, And The International	77
2.7.2 The Bhelwala Who United India	81
2.8 Chapter Conclusion.....	84
Chapter 3 – Facets of the Assemblage	86
3.1 Chapter Introduction: The Role of Theory in the Assemblage.....	86
3.2 Working Courts between Security and Law and Order Critique	89
3.2.1 The Law and Order Critique in The TCA.....	89
3.2.2 The Role of the Law and Order Critique in the TCA.....	98
3.2.3 The Security Critique in the TCA	100

3.2.4 Both Critiques In The Assemblage.....	105
3.3 Assemblages And Other Macro-Theories	107
3.3.1 Social Systems Theory And The TCA	109
3.3.2 Critical Legal Studies And The TCA	113
3.3.3 Exception And Emergency In The TCA	119
3.3.4 Sovereignty, Power and Governance In The TCA.....	125
3.4 Chapter Conclusion: Theories In The TCA	134
Chapter 4 - The Method Of The Assemblage	135
4.1 Introduction	135
4.2 Fieldwork	136
4.3 Case Study	138
4.4 Interviews	141
4.5 Participant Observation.....	147
4.6 Legal Documents And Cases.....	149
4.7 Back To The Assemblage	153
Chapter 5 – Productive Mess.....	157
5.1 Introduction	157
5.2 The working Background of the TCA	161
5.2.1 Outlines of the Pre-existing Legal Assemblage and Pre-existing Security Assemblage	161
5.2.2 Outlines of the Temporal and Spatial Scope of the Hinterlands	171
5.2.3 Heterogeneity and ‘Messiness’	173
5.3 Actors and Actants in the build-up to the TCA.....	174
5.3.1 Laws	174
5.3.2 Legislative and Politicians	183
5.3.3 The Prosecution	186
5.3.4 The Police	187
5.3.5 Judges and Magistrates.....	193
5.3.6 Spaces and Locations.....	195
5.3.7 Messiness and the Anomaly of Smoothness	199
5.4 From the Hinterlands to the TCA – Section Conclusion	201
Chapter 6 – Case Study I / Nasir and the Choreography of Terror.....	203
6.1 Chapter Introduction	203
6.2 The Divide and How to Clear up a Mess	205
6.2.2 The Nasir TCA Becoming	208

6.2.3 The Incident.....	209
6.2.4 The Investigation.....	210
6.2.5 Initial Translations – Laws and Legal Categories.....	211
6.3 The Breakthrough – The Travels of an AK 47 a Dying Declaration	225
6.3.1 The Kalashnikov	225
6.3.2 The Encounter and the Dying Declaration	228
6.3.3 The Connection - A Car, A Motorbike and a Garage	234
6.3.4 The Motive – A few Emails and a Letter	236
6.3.5 The Judgments as Mediators.....	239
6.4 Soldering the Two Assemblages – Nasir Traveling up the Courts and Embedding in a Network of Precedent	242
6.5 Case Study I Conclusion	244
Chapter 7 – Case Study II / Aftab’s Stabilisation	246
7.1 Chapter Introduction - Three Crucial Translations	246
7.2 Introduction to the Aftab TCA	249
7.3 The Incidents – Working Backward	250
7.3.1 The Judgment.....	250
7.3.2 Jama Masjid Blast	251
7.3.3 Kanjumarg / Vikroli Blast.....	252
7.3.4 Goregaon / Malad Blast.....	253
7.3.5 Golibar / Santacruz Blast.....	254
7.3.6 Kandivali Blast.....	256
7.3.7 Virar Blast.....	257
7.4 Translations, Laws and Legal Categories	259
7.4.1 The Indian Penal Code	259
7.4.2 The Indian Railways Act.....	261
7.4.3 The Prevention of Damages to Public Property Act and the Foreigner’s Act.....	262
7.4.4 The Ghost of TADA.....	262
7.5 Traduction/Trahison	264
7.5.1 The Breakthrough – Accidents, Approver and Recovery.....	265
7.5.2 The Witnesses and the Motive – Star Witness Sanjay and the Suspicious Meeting.....	267
7.5.3 TIPs and Connections between Witnesses, Incidents and Accused	275
7.6 The Judgments as Mediators	276
7.6.1 Percolating Up – Sessions Court, High Court, Supreme Court.....	277

7.6.2 The Roles of Prosecution, Judge and Defence	283
7.7 A Tale of Two Assemblages - Chapter Conclusion	289
Chapter 8 – Conclusion	291
8.1 A Summary	292
8.2 Assemblage Thinking, Terrorism and Courts	295
8.3 From India to the Wider World	296
8.4 Implications for Practice and Forward Looking Research	298
vi. Interviews	300
vii. Bibliography	303

iii. Abbreviations

13/12	13 th of December 2001 – The date of the New Delhi Parliament bombing used to refer to the attack itself, drawing an intentional parallel to 9/11.
9/11	11 th of September 2001 – The date of the attacks on the World Trade Centre in New York City, also used to refer to the attack itself.
A.O.	And Others
ACLU	American Civil Liberties Union
AFSPA	Armed Forces Special Powers Act
AK 47	Automata Kalashnikov the world's most common assault rifle initially introduced into broad use with the Red Army in 1947
ANT	Actor Network Theory
BJP	Bharatiya Janata Party
CBI	Central Bureau of Investigations
CLS	Critical Legal Studies
CPR	Centre for Policy Research (Delhi)
CrPC	Criminal Procedure Code
CT	Counter Terrorism
DCB CID	Detection Crime Branch – Crime Investigation Department
DGP	Director General Police
EPW	Economic and Political Weekly
FIR	First Information Report
GWOT	Global War on Terror
HC	High Court
HRW	Human Rights Watch
IED	Improvised Explosive Device
IPC	Indian Penal Code
J&K	Jammu and Kashmir
LeT	Lashkar-e-Toiba
LTTE	Liberation Tigers of Tamil Elam
MCOCA	Maharashtra Control of Organised Crime Act

MRT	Midland Reporter Telegram
NCRB	National Crime Records Bureau
NCTC	National Counter Terrorism Centre
NGO	Non-Governmental Organisation
NIA	National Investigations Agency
P.W.	Prosecution Witness
PI	Police Inspector
PLO	Palestine Liberation Organisation
POTA	Prevention of Terrorism Act
POTO	Prevention of Terrorism Ordinance
PSI	Police Sub-Inspector
PUCL	People's Union for Civil Liberties
R/I	Rigorous Imprisonment
r/w	Read With
Rs	Rupees
RSS	Rashtrya Swayamsevak Sangh
RTI	Right To Information
S.P.	Superintendent of Police / Special Prosecutor
S/I	Standard Imprisonment
SC	Supreme Court
SLP	Special Leave Petition
START	National Consortium for the Study of Terrorism And Responses to Terrorism
STS	Science and Technology Studies
TADA	Terrorist and Disruptive Activities (Prevention) Act
TCA	Terror Court Assemblage
TIP	Test Identification Parade
u/s	under section
UAPA	Unlawful Activities (Prevention) Act
USA PATRIOT Act	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act

iv. Table of Statutes

From India

Armed Forces Special Powers Act, 1958
Arms Act, 1959
Constitution of India, 1950
Criminal Procedure Code, 1973
Explosive Substances Act, 1908
Foreigners Act, 1946
Indian Evidence Act, 1872
Indian Penal Code, 1860
Indian Railways Act, 1989
Maharashtra Control of Organised Crime Act, 1999
National Investigation Act, 2008
Prevention of Terrorism Act, 2002
Prevention of Terrorism Ordinance, 2001
Terrorist and Disruptive Activities Prevention Act, 1987
The Prevention of Damages to Public Property Act, 1984
Unlawful Activities Prevention (Amendment) Act, 2004/2008/2011
Unlawful Activities Prevention Act, 1967

From the Rest of the World

Anti-Terrorism, Crime and Security Act, 2001 (UK)
USA PATRIOT Act, 2001 (USA)

United Nations Security Council Resolutions

UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373

v. Table of Cases

Cases From India

Aloke Nath Dutta and Others v State of West Bengal (2007) 12 SCC 230

Amitsingh Bhikamsing Thakur v The State of Maharashtra (2007) 2 SCC 310

Bhagwan Singh and Others v State of Madhya Pradesh (2003) 3 SCC 21

Bodhraj and Others v State of Jammu and Kashmir (2002) 8 SCC 45

Chandran vs State of Tamil Nadu (1978) 4 SCC 90

Chonampara Chellappan v State of Kerala (1979) AIR 1979 SC 1761

Dudh Nath Pandey v State of Uttar Pradesh (1981) 2 SCC 166

Esher Singh v State of Andhra Pradesh (2004) AIR 2004 SC 3030

Govinda Pradhan and Another v State (1991) 1991 CLJ 269

Hanumant Govind v State of Madhya Pradesh (1952) AIR 1952 SC 343

Jit Singh v State of Punjab (1976) AIR 1976 SC 1421

K.T.M.S. Mohd. and Another v Union of India (1992) 1 SCC 572

Kanan and Others v State of Kerala (1979) 3 SCC 319

Kora Ghasi v State of Orissa (1983) 2 SCC 251

Mahendra Pratap Singh v Uttar Pradesh (2009) 11 SCC 334

Mohammed Abdul Hafeez v State of Andhra Pradesh (1982) AIR 1983 SC 367

Mohammed Ajmal Kasab v State of Maharashtra (2012) 9 SCC 1

Mohammed Jamiluddin Nasir v State of West Bengal (2014) 7 SCALE 571

Mohanlal Gangaram Gehani v State of Maharashtra (1982) 1 SCC 700

Nazir Khan and Another v State of Delhi (2003) 8 SCC 461

Paramananda Pegu v State of Assam (2004) 7 SCC 779

Saju vs State of Kerala (2001) 2001 CLJ 102

Sardar Khan v State of Karnataka (2004) 2 SCC 442

Sardul Singh Cavesshar v The State of Maharashtra (1964) 2 SCR 378

State of Himachal Pradesh v Lekh Raj and Another (2000) 1 SCC 247
State of Maharashtra v Damu Gopinath Shinde and Others (2000)
AIR 2000 SC 1691
State of Maharashtra v Sadruddin Jan Mohammad Bardia and others
(1992) 1992 SCC 974
State of West Bengal and Another v Md. Khalid and Others (1994)
AIR 1995 SC 785
State v Nalini (1999) 5 SCC 253
State v Navjot Sandhu and Others (2005) AIR 2005 SC 3820
Vinod Kumar Shukla v State of Madhya Pradesh (2008) 2 MPHT 18

Not Published in Print:

The following cases are the basis of the case studies; the author was allowed to copy the files at the law firm during the participant observation. Some of these can also be found through the respective Court's websites.

Nasir Sessions Court:

State of West Bengal v Mohammad Nasir and Others, Death Reference No. 2/2005 Decided by the High Court of Calcutta on 5th February 2010

Nasir High Court:

State of West Bengal v Mohammad Nasir and Others, Sessions Case No. 79 of 2002

Aftab Sessions Court:

Mohammad Sagir Mohammad Bashir and Others v State of Maharashtra, Sessions Case No. 643/98 @ 643-A/98 (I.E. 160/00) @ 1135 OF 1998 Decided by the Sessions Court for Greater Bombay on the 9th of July 2004

Aftab High Court:

Aftab Saeed Ahmed Shaikh v State of Maharashtra, Criminal Appeal NO. 1324 OF 2004, Decided by the High Court of Bombay on the 19th July 2013

Kasab Sessions Court:

The State of Maharashtra v Mohammad Ajmal Mohammad Amir
Kasab and others, Sessions Case No 175 of 2009, Decided by the
Sessions Court for Greater Mumbai on the 6th of May 2010

Chapter 1 - Introduction

1.1 Field Diary Entry: 20/03/13 10:00

A few days ago Rajat, a junior lawyer in a small firm based in Delhi, invited me to join him at Tis Hazari Sessions Court. With its own metro station, Tis Hazari Court is a bustling utilitarian complex of buildings. Crossing the pedestrian bridge from the metro to the court, I come past a few pavement hawkers selling with equal zeal peeled cucumbers, sunglasses, clip-on ties and legal texts. Here I have to cross the first layer of security, which keeps the outer courtyard clear of beggars and obvious weapons. A half-hearted pat down and glance into my bag later, I am inside the yard. It is full to the brim with lawyers advertising their services with shouts and old black boards propped up against their typewriters. They are selling affidavits and other legal documents in a manner oddly similar to the hawkers outside. There is a determined throng of people pushing their way towards the court doors and the inner layer of security. The check here is more intensive and involves a functioning metal detector as well as a thorough rummaging through the things in my bag. There is a metal door, going onto an open courtyard with a drain to the side, which also serves as the drain for the toilet facility one door down. To my great delight there is also a slowly rotating wall mounted fan.

1.2 A Few Preliminary Remarks

These, my first steps into the Tis Hazari Sessions Court in Delhi, are also my first concrete steps into this project.¹ The record of my impressions on that first day as part of my field diary guides the way

¹ Throughout this work I am using the first person pronouns following Annemarie Mol's example. (A. Mol 2010) This work does not come out of nowhere. By editing it so that it appears to be of universal validity handed down out of nowhere I would engage in one of the processes of stabilization and reification that we will encounter throughout this inquiry. I therefore use "I" in reference to me, "we" in reference to you dear reader in combination with me and the text, and "this inquiry/this work" for processes that are driven by the task I set for myself. "I hope [this use of the "I"] will evoke the concerns of the self-reflexive turn, that in seeking to move from universalist pretensions, stages the author as one of the sites where the text is situated" (A. Mol 2010, 254).

through this introduction. Each excerpt introduces an important aspect of my work. So in the first vignette I recount how I first encountered the court. It shows at once the puzzling complexity of interaction taking place in and around the court, the strong, layered delineations between localities of the court complex. The snapshot of my diary also features various elements of importance throughout this thesis. For example the impact of mundane objects, like a fan, on tasks, like waiting and observing. It also illustrates the routine interactions between legal professionals and members of the security services, as in the security checkpoints. Finally and perhaps most importantly there is an important aspect of this thesis reflected throughout this introduction with its eight vignettes and that is the tension between sequential accounts and the non-sequential way that sense making works. In other words, throughout this thesis I ask the reader on occasion to embark blindly with me on an episode, section or chapter, which falls increasingly into place as the reader progresses. The reason for this is that reading and writing are sequential activities which follow the clear pathway of the text, whereas researching and understanding proceed in leaps and bounds, both forwards and backwards. Gilles Deleuze and Felix Guattari to whose work, I am indebted for the scaffolding of this work speak of this tension as that between arborescence and the rhizome. (Deleuze and Guattari 2004) Arborescence is a force that drives along set pathways and vectors, such as the branches of a tree shooting, reaching towards the light. In contrast, the rhizome expands laterally and with complex connections between each of its parts, it is an expanding force but not one with a clear directionality. It is the reflection of this tension in my work that sometimes requires the reader to bear with me for a passage before that passage falls in place through the connection made in the next one.

1.3 Field Diary Entry: 20/03/13 10:15

Since Rajat has not shown up, I look around. The picture is dominated by the black and white of the legal profession. But there is also a surprising amount of police Khaki, and of the plain whites of those dressing up to come to court. It is

clear that the senior lawyers are in the abode of their power, sweeping through the corridors at full speed with a little bubble of space and numerous assistants running behind, carrying files or fending off supplicants trying to get a word in sideways. Watching the unfolding sceneries, dominated by unwritten rules I only begin to grasp, for a while I turn my attention to the case I am about to attend. I have been told that for the last three years, every Wednesday the prosecution has been bringing forward their witnesses. The incident is the explosion of several bombs in 2008 and one was found which didn't go off.² The locations were very central with Tilak Marg, Connaught Place and the M Block of GK Market being the presumed targets, or at least the places where the bombs did explode. There are all told 13 accused, but only two are held in custody in Delhi, the others are in two different jails in Gujarat. My attention returns to the people around me, there is a multitude of human interactions, handshakes, hugs, handholding, laughter, conversation, but interestingly I notice that it is always between officers amongst themselves, lawyers amongst themselves or either group with civilians, there is almost no interaction visible between lawyers and police officers.

1.4 Context

Not a day passes without some atrocious act between humans taking place. Daily around the world people die in violence, some of those deaths are attributed to terrorism.³ Many more are not attributed to terrorism.⁴ Those attributed to terrorism are often explained by some invisible root cause⁵ of terrorism or individual psychological phenomenon.⁶ Research abounds on the enabling factors for terrorism, poverty,⁷ ideology,⁸ religion,⁹ psyche,¹⁰ education levels,¹¹

² While the actors I spoke to related only two bombs and one dud, newspaper reports of the incident speak of a series of five blasts. (M. Singh 2008; PTI 2011).

³ The American START organisation of the University of Maryland even maps them out every year. (START 2015).

⁴ For an outlining of issues and areas that are not talked about as terrorism see (Chomsky 1987).

⁵ There is a very wide literature on root causes of terrorism for some interesting contributions and critiques see (Akhmat et al. 2014; Alan B. Krueger 2007; Bjørge 2005; Campana and Lapointe 2012).

⁶ See for example (Ginges 1997; Koseli 2007).

⁷ See for example (Koseli 2007).

⁸ See for example (McBride 2011).

radicalisation,¹² group dynamics¹³ and other root causes. As well as practical and often secret manuals on how to counter it, from tactics, profiling, airport security, layered security models, intelligence, surveillance, interrogation, prosecution memos, special courts, detention camps, special laws, definitions to UN Resolutions.¹⁴ The questions that remain unanswered include: why are some incidents of violence terrorist and others not? Who are these terrorists? Why are they always the other guys? Some of the legal literature focuses on definitions,¹⁵ others focus on othering,¹⁶ positionality and labelling.¹⁷ While these contributions are important and insightful, I am left wondering why these processes of labelling, othering and positional definitions are sometimes successful but fail on other accounts. My inquiry explores how, going beyond labelling, an actor network works to solidify and stabilise a terrorist. The work of the actor network, the efforts of translation, stabilisation and inscription that go into the successful actor network are what makes the terrorist terrorist. It goes beyond labelling as the process is laborious and extends beyond a limited speech act. But it also shifts the locus of where the terrorist comes into existence from the dust, smoke and debris of the

⁹ See for example (Greenfield 2012; Masters 2008).

¹⁰ See for example (Rios 2007; Smelser 2007).

¹¹ The correlation identified by some authors between education levels and terrorism is, complex, counterintuitive and often controversial (Sinai 2007; Sukarieh and Tannock 2016).

¹² Radicalisation is commonly used for the process of a person becoming a terrorist, it is therefore an interesting parallel to this work, for select examples see (Tsintsadze-Maass and Maass 2014; Botha 2015).

¹³ See for example (Miller 2007; Jacuch, Speckhard, and Pick 2009).

¹⁴ See for example (Herschinger 2013).

¹⁵ Sidestepping the stuck controversies surrounding legal definitions of terrorism is one of the motivations for this work nevertheless there are many very valuable contributions in this area. See for example (Hardy and Williams 2011; Bruce 2013; Escribano Úbeda-Portugués 2011; Golder and Williams George 2004; Greene 2014; Grozdanova 2014; Ruby 2002).

¹⁶ See for example (Herschinger 2013).

¹⁷ See for example (Bob Fick 2004; Ansari 2007; Appleby 2010; Moghadam, Berger, and Beliakova 2014; Simmons and Mitch 1985; Weinman 1985).

explosion site to the dimmed, stuffy and complexly coded environment of the courtroom and legal office. As the second excerpt from my field diary above shows, this environment is not only complex but also dominated by two groups in particular, those whose profession it is mainly to work with the law and those whose main occupation is related to security.¹⁸ They come together in the court. In this work I combine four elements; terrorism, India, courts and assemblages. When I set out for this study the focus was on special counter terrorism laws in India. It was this focus that initially brought me to Tis Hazari. However during my fieldwork I was time and again confronted with connections between actors and on-going processes that the theories I had touched upon before could not explain. From security laws my focus shifted to processes in and around courts. My attention moved from counterterrorism to the terrorist. An all India outlook was increasingly pruned to focus on a select few cases and assemblage thinking helped me work out the terminology and theoretical scaffolding of my work. The transformation from a broad-brush macro project to an almost archaeological micro project has also changed the contribution that I seek to make. In this thesis I demonstrate how the choreography between security and law stabilises the terrorist in court. The terrorist as the embodied carrier of the terrorism theme is a legal, political and popular category. An assemblage encompassing security and law contributes to the curating of the widespread consensus about who is a terrorist and who is not, and for that matter what incident is terrorist and what is not.

1.5 Field Diary Entry: 20/03/13 10:30

By now Rajat arrives, and after hastily smoking a cigarette in the courtyard and answering some of my questions, and politely laughing at my observations, we head inside the Courtroom. Except for the prominent chair of the Judge, designed with remote similarity to King Edward's Chair and covered with a cut out piece of red

¹⁸ For a discussion of the concept of security see: (Weldes et al. 1999) and (Buzan, Wæver, and Wilde 1998) as well as (Nye and Welch 2012).

carpet, situated on an elevated pedestal behind a shoulder high wooden barrier to the floor of the court, nothing is quite as I expected it. There are two computers from the 90's in the room, which seem oddly out of place both with the early twentieth century wood work on one side and the ultra modern sleek of the flat screens of the videoconferencing equipment on the other side. Except for this there is a big metal cupboard locked with a padlock, which I am told contains files and evidence, a couple of shabby sofas and a few rows of chairs. Slowly the advocates filter in, and begin grouping themselves at the barrier, towards the left of the judge, close to the keeper of records. I am told that today two witnesses are being heard, when I express my surprise at the rate of the trial, one meeting a week, two witnesses a meeting, a few hundred prosecution witnesses, I am told that no one has a real interest in getting these trials over with. Judge Narender Kumar has a very good reputation, meaning he is considered hard working, has a good knowledge of the law and is fair-minded to all sides. When I ask again why parts of the accused are only present via videoconferencing, I am told that the accused themselves also do not want to be in jail in Delhi, because the jail in Gujarat is much nicer. While the FIR against them was filed in Delhi, the charge sheet was issued in Mumbai, and there are simultaneous proceedings against them in Delhi and in Gujarat. While Rajat only nods knowingly when I ask him about why the same accused can be tried for the same offence, in this case membership in an illegal organization, in two different courts at the same time, there seems to be something odd about the entire situation.

1.6 Argument

Terrorists are not unveiled in the dust and rubble of an explosion, they are stabilised and articulated through processes that reach from before¹⁹ to the aftermath of an incident.²⁰ This stabilisation takes place under tension between legal/law and order assemblages and security assemblages. The court is the location where these are choreographed, a chain of reference is crafted and the individual terrorist is made to be, speak and act. This stabilisation takes hard

¹⁹ For example by attributing narratives of becoming to individual terrorists as in (Sarangi and Alison 2005).

²⁰ For a very interesting overview of sociological approaches to understanding terrorism see (Turk 2004).

work and is precarious. However once it has been successful various layers of inscription naturalise it and make the process of its making invisible. It is because of such efforts that we are confronted with widespread agreement on who the terrorists are despite no agreed definition of terrorism. In addition to effort this stabilisation makes use of various human and non-human actants that come together in an assemblage.

Terrorists and terrorism are socially constructed. They are not naturally occurring categories of beings or relationally independent phenomena. Instead they arise out of relations between actors. Or even more precisely they are made to arise between actors by a range of actants and hard work. Terrorist facts are articulated through a crafted chain of reference. Before we return to this central point a few preliminaries. The terror phenomenon is a composite of material and ideational components. The terrorist body is the trace around which the ideational frame of terrorism is stabilised. Three caveats; first, nothing below should be construed as to diminish the horror and impact of terror on victims and people around the world. Second, the claim that the semantics of terrorism arise relationally between victims and perpetrators does not intend to distribute responsibility or somehow make the victims share the blame. Third, that something is constructed and artificial does not mean that it is any less real or weighty than if it were natural.

This being said, both the terrorist and terrorism come into existence relationally. To use the paraphrase of an old question; if a bomb blows up in the woods and no one is watching – is it terrorism? Has to be answered with a definite no. In fact some bombs, for instance when thrown from a plane, blow up in market places killing dozens of civilians and yet it is not terrorism. We have to start from somewhere, and as the majority of cases of terrorism do, let us start with an incident. The incident is intensely terrifying for those in its immediate vicinity. Such a moment of terror can become terrorism, but it can also become something else. Instead of an Improvised Explosive Device (IED) it may be a gas pipe that blew up, instead of

terrorists gunning down civilians it may be a turf war between gangs. At the moment of terror a great deal of indeterminacy remains. It is in the aftermath that the material and ideational components of terrorism are assembled, or not. Links and connections need to be crafted between events, that do not yet have meaning and significance, and carriers of meaning and significance such as texts or other repositories of articulation. At the moment of terror the indeterminacy also means that both the terrorist and terrorism are still precarious. A large number of studies focus on the role played by the media, police, politicians, etc. in constructing and maintaining terrorism in the aftermath of a moment of terror.²¹ The moment of terror is translated into terrorism and thus stabilised in time. This stabilisation is nowhere as apparent as with 9/11, which is now even used to demarcate two world eras. The translation of a moment of terror into terrorism with its ramifications that reach backwards and forwards in time is the result of a successful group formation. This relative stability that terrorism acquires is the result of a multitude of choreographed processes between actants.

Similarly, the way in which the incident is inscribed onto a person to make them terrorist is also the result of a number of translation processes. Again it is important here to keep in mind that this is not a moral evaluation: it is entirely possible to remain agnostic about the morality of the deed, and the responsibility of the individual when describing the processes of translation and stabilisation that serve the inscription.²² All the while realising that even before 9/11 a strong moral condemnation of terrorism existed.²³ The interesting question that this work addresses is how does the suspect become a terrorist.

²¹ Examples include: (Balfour 1993; Donohue 2003; Gillespie and O'Loughlin 2009; Held 1997; Miller 1992; Nagar 2010; Noorani 1992; Rohner and Frey 2007; Sinai 2007; Slone 2000; Udupa 2009).

²² For a very good discussion about the roles of arguments about morality and its links to globalization see (Devji 2005).

²³ Studies about the morality of terrorism also abound, for an overview from before the frenzied Global War On Terror (GWOT) see: (Corlett 1996) or more critically (Baudrillard 2003).

Stabilisation takes place and translations are necessary to imbue the individual with the phenomenon. This process may be the same for murderers and a range of other crimes, but with terrorism the consequences are more far reaching. There is no global war on murderers per se, while the Global War on Terrorism has defined a decade of world history.²⁴ Instead of wide sweeping macro statements this investigation looks at the micro level of becoming terrorist.²⁵ Two specific case studies from India are used supported and contextualised by a number of interviews and other relevant incidents to offer a description of how the individual becomes the terrorist. To have a relatively clear boundary around the object of the investigation I am focusing on how the courts, and the court cases relating to two incidents of terrorism are used to stabilise, articulate and inscribe a chain of reference which leads to terrorist facts speaking for themselves. It is important to note that while one of these cases is post 9/11 the other one is from the nineties. Neither one of them uses pre-scripted categories of terrorism, but rather the accused emerge as terrorists out of the relations between a number of actants including human actors, objects and legal machines.²⁶ My argument is that the material and ideational aspects of terrorism have to be brought together at the micro-level for a group delineation terrorist-non-terrorist to take hold. This bringing together involves hard work and multiple translations in an assemblage, which articulates a chain of reference to make the terrorist speak.

²⁴ The impact of the GWOT has been debated with zeal almost since its inception. See for example (Bose 2005; Davis 2008; Köchler 2008; Mazari 2007; Feyyaz 2009; Bacevich 2007)

²⁵ Becoming is a highly complex concept. For a discussion reflective of how I use it here see (Deleuze and Guattari 1994, 173).

²⁶ By this I mean that no special law using terrorist/terrorism as categories was in place during the first case study, whereas the second case study deliberately did not use the available law. In both case studies the prosecution relied on regular criminal law to make their points.

1.7 Field Diary Entry: 20/03/13 10:45

From what I can tell, by now the videoconferencing equipment is showing a split screen with a small group of accused, sitting on a crowded bench in front of a light blue wall on one side and another handful of men sitting in front of a red wall on something which looks like garden chairs and stools. I am struck by how normal they look, they are all wearing beards, but otherwise their attire of multi-coloured t-shirts evokes neither prison uniform nor visible signs of fanatical zeal that I naively expected. Chatting amongst themselves, sometimes squinting slightly past the camera, even laughing occasionally, I am struck by exactly how different these accused are from what I had expected. Clearly the routine of the trial, every Wednesday, for an hour or so over years, probably followed by appeals and reviews, has buried the edge of the potential death sentence standing at the end of it, in the boredom of prison routine. The men are young, perhaps in their late twenties early thirties, they are going to be much older by the time this trial nears its end. My attention is suddenly drawn from the screen to a small man, sweeping into the room, greeting everybody, making a few jokes and settling in, on the opposite side of the flock of defence lawyers. When I ask, the whispered answer is, that this is Rajiv Mohan, one of the most feared prosecutors in Delhi, the favourite of Special Cell, he is at the moment particularly busy because he is also the chief Public Prosecutor in the December 2013 Rape Case, which shook Delhi and the wider world. There a few young men in plain clothes who are milling about Rajiv Mohan, and who I am told are part of Special Cell, wearing no uniforms, nor any visible weapons, no one can tell me why exactly they have come to court, except to say, that they are under no legal obligation to be there. The case at hand, I am now told also has something to do with the Batla House encounter²⁷, which followed it shortly after Special Cell took over and during which the alleged head of the conspiracy, Atef Amin, and some police officers died.

²⁷ The Batla house encounter, 19th September 2008 is perhaps one of the most controversial incidents of recent Delhi Counter Terrorism operations. A number of people were shot under very suspicious circumstances, including police officers and alleged terrorists. It is peripheral to this inquiry but more information on it can be found here: ('Batla House Encounter: BJP Stages Protest, Accuses Congress of Propagating False Facts' 2016, 'Http://EconomicTimes.indiatimes.com//Articleshow/.cms' 2016).

It has been one of the most controversial episodes in the recent history of Special Cell, described as a “fake encounter” by many commentators.

1.8 Reader Relevance

This inquiry matters because only if we understand the socially constructed nature of the terrorist, can we avoid playing into the hands of certainly dangerous social forces.²⁸ Terrifying violence, the politicisation of fear²⁹ and the playing with public perceptions are all very real evils in this world.³⁰ But treating all terrorist alike oblivious to the processes of their making does nothing for our ability to work towards a safer and better world. This task is therefore both humble and hubristic. The aim of this investigation is to do away with the black box of ‘the terrorist’ that results in blanked fear and hatred leading to torture memos and policies such as ‘we do not negotiate with terrorists’ and to terrorists always only being the other guys.³¹ Instead of this black box with its immense baggage I propose a more nuanced and slower appraisal of what is a step-by-step process of making a terrorist. By de-reifying the process of stabilising the terrorist we can gain an understanding of the phenomenon as socially constructed, precarious and relational but nevertheless real and impactful. In itself such a destabilisation, is not much, it is always easier to wreck something than to build something up. But the destabilisation opens the possibility of avenues for intervention. If we understand the terrorist and terrorism as emerging out of relations between actants encompassing human actors and a wide range of non-human actants, we gain new points of leverage for intervention.

²⁸ While the idea that terrorism is socially constructed has received some attention (Turk 2004; Vertigans 2011) I focus on the concrete stabilization of the individual terrorist rather than the phenomenon.

²⁹ A powerful argument for this is made in (Prantl 2008).

³⁰ Examples of all three of these problematic aspects can be found in the edited volume by (Raju 2004).

³¹ There is a lively debate about the appropriate reactions to terrorists and government policies reflect changing attitudes. See some examples from (Raven-Hansen 2008; Sharma 2009; Neumann 2007; Blum and Heymann 2010; Browne and Dickson 2010; Waldron 2004).

An assemblage/actor network approach allows this inquiry to sidestep easy and fallacious claims about counter-terrorism, ranging from incompetence, to incongruence, chaos and conspiracy and thus to show the emergence of the terrorist as a precarious and laborious process which is however entirely based in a delicately balanced choreography of ordinary steps and practices. This laborious, precarious and ordinary nature of the stabilisation of the terrorist adds further credence to the instinct to be careful about claims of extraordinary-ness and emergency in response to terrorism.

1.9 Field Diary Entry: 20/03/13 11:00

It is 1100 the judge is arriving and all stand. He makes no comment to me but I am the only visitor. Inside the room the windows are barred and boarded up, to allow the small AC to do its semblance of work. The proceedings begin, and I quickly realize where the action is. The lawyers, including the Prosecutor are in one big scrum in front of the judge, each pressing in to reach the judges attention, screaming and shouting in order to make their point. The judge is engrossed in his reading and only occasionally absentmindedly nods or waves his hand. While the din, and the swift moving back and forth between English and Hindi make it difficult for me to understand everything it is clear that this has not yet anything to do with the substantive proceedings, but rather that the list of witnesses and the schedule for today are being discussed, debated and negotiated. In a moment of quiet, the Prosecutor, motions me forward and tells me to sit on one of the Sofas in the first row. While he is grinning widely, he does not bother to even look at the judge before ordering me about the courtroom. While I am thankful to now have a comfortable seat allowing me to overhear even what the judge quietly tells his scribe, I quickly realize that this is not merely courtesy, but rather that the accused are now brought in and take over the back row. The two accuse in Delhi, are significantly more threatening looking than the ones seen on the flat screens. Not only are they very tall and bearded, but they are also surrounded by at least a dozen heavily armed police officers. The antique jumble of Second World War sub machine guns, First World War rifles, and knock offs of modern assault rifles made in China, display an anachronistic weaponry which oddly clashes with the modern flat screens and the smart phones of the lawyers. Once the accused are brought inside, and two unarmed officers sitting at each of their sides, the rest moves

out of the room, and bars the door from the outside. While it sinks in that these men are suspected number one enemies of the state, I realise to my surprise that the accused and the officer to their left are holding hands, fingers entwined in an out of place intimacy. While I am trying to gauge this strange display, Rajat whispers in my ear that it has to do with security concerns in the light of the Supreme Court guidelines that accused were not allowed to be shackled inside the Court. The judge is listening to the second witness, some difficulties with the Teleconferencing equipment not withstanding he dictates the record steadily. While the witness speaks in Hindi, the judge translates the statement into English for the record, this is simultaneous to the speaking of the witness, the defence and the prosecution are barging in to offer suggestions how this word or that sentence should be translated differently.

1.10 Literature Relevance

Studies about terrorism abound. Even before 9/11 the terrorism literature was a prolific field and it has exploded since.³² With several dedicated journals, hundreds of books and thousands of articles the depth of engagement with some issues is impressive.³³ Nevertheless, and this is perhaps a pre-programmed ‘disciplinary’ failure, the vast majority of accounts treats terrorists as given, discoverable entities.

Where does Terrorism come from? This is a question most often answered with a mobilisation of political, social, theological, economic or psychological arguments.³⁴ Terrorists are deterred,³⁵ pre-empted,³⁶ profiled, modelled,³⁷ contextualised,³⁸ countered,³⁹ and

³² A great example of pre-9/11 literature is (Gearty 1997).

³³ At the time of writing (26th of August 2016) a search of the term “Terrorism” on www.jstor.org results in 50 289 results, while the SOAS library has 1031 books in its catalogue with terrorism in the title.

³⁴ See for example (Moghadam 2009) on the most extreme form of suicide terrorism and (Forest 2006) for an overview.

³⁵ See for example (Alex S. Wilner 2015; Das and Roy Chowdhury 2014; Ginges 1997; Dugan and Chenoweth 2012).

³⁶ See for example (Goede 2008).

³⁷ See for example (George 2003; Lafree, Dugan, and Korte 2009).

³⁸ See for example (Tan 2006).

prosecuted.⁴⁰ More rarely does the investigation touch upon how they make themselves. If it does, most often it focuses on radicalisation processes, group formation, indoctrination or disillusionment as processes of making the committing of terrorist acts plausible avenues for individuals.⁴¹ Inquiries aimed at investigating how ‘we’ make terrorists often smack of conspiracy theory.⁴² But between revisionist narratives of controlled explosions at the World Trade Centre, cruise missile attacks on the Pentagon and speculative scrutiny of the undoubtedly murky relations between the USA and Saudi Arabia there are a number of productive avenues for thought. Ranging from plausible accounts of the framing of individuals for acts they did not commit, over governance through maintaining a climate of fear, to the effect of speech acts and labelling theory on attaching the terrorist label to individuals.⁴³ Without wanting to critique labelling theory in an exhaustive way, the relative stability seen in the casting of terrorists suggests that there is more at work than symbolic interactionism.⁴⁴ The transportability of terrorists and the operation of the terrorist category across time can be adequately explored under a framework of assemblage thinking and Actor Network Theory (ANT).⁴⁵

The harder questions, and more appropriate to ask than the question about the origins of terrorism, are; what is the relation between the

³⁹ An exploration of counterinsurgency is provided in (Sitaraman 2013) and contains many parallels to counterterrorism.

⁴⁰ See for the Indian context (Ganguly and Fidler 2009; J. Eckert 2012; Ghosh 2002) but also more widely and overlapping with counter-insurgency (Dixon 2012; Arquilla 2007).

⁴¹ For example there is a large literature focusing on the role of rational choice in terrorist and counter terrorist decision making (Alex S. Wilner 2015; Bryan Caplan 2006; Ganor 2015; Etzioni 2010; Ellingsen 2009; Fussey 2011).

⁴² See (Jones 2010; Keenan 2006; Knight 2008).

⁴³ For example (Beyer 2009; Moghadam, Berger, and Beliakova 2014).

⁴⁴ For the beginnings of labeling theory and symbolic interactionism see (Mead 1964) but also more recently (Hacking 1999).

⁴⁵ For an introduction see (Latour 1999).

terrorist and terrorism? Why is this relation so consequential but also ephemeral in nature? Why is it that some people commit frightful acts and are not terrorists, whereas others engage in inane activities and become terrorists? What lies at the heart of the extraordinary repercussions that becoming a terrorist has for the individual? To find out more about these questions this inquiry ventures to the final arbiter of societal truth, the courts.⁴⁶

To take stock again before we dive in: we have a series of terrible incidents, a category the definition of which is continually embattled, an idea of an act – terrorism – which is considered the scourge of our time, an indeterminate group of people who become the embodiment of that embattled definition and the carriers of that idea and a frenzied, Sisyphean determination to eradicate both the carriers and the idea in the Global War on Terror in order to stop the incidents. The majority of studies in this regard treat the terrorist as exogenously given at the time of the incident. Their focus is on a becoming that takes place before the incident. A smaller share of the literature investigates the becoming through labelling. The risk with the first group is to jump straight from the incident to the war like mode of eradicating the enemy. The problem however remains that as long as we treat terrorists as black boxes rather than as a relationally constructed and stabilised group we are unable to perceive all the actors involved in their making and thus intervene where this intervention is most likely to be successful. Furthermore, without giving thought to the distributed agency in the assemblage action it is easy to misunderstand what makes terrorist facts. Therefore in this inquiry we are going to explore the becoming terrorist of two very concrete individuals, Nasir and Aftab, on their way through the Indian courts. The extraordinary repercussion this becoming terrorist has for them personally is belied by the mundane yet complex choreography of relations that stabilises them through the court. Furthermore the persons dropping on the wayside of the

⁴⁶ This draws both on my experience during participant observation and on literature such as (Shourie 2001; Merry 1994; Valverde 2005).

road to terrorism as the cases percolate up through the courts illustrate the precarious nature of this stabilisation. Up to the point of the final and successful stabilisation at the Supreme Court by what time the initial translations and the laborious process of stabilisation has become all but invisible. Nasir and Aftab have become naturalised terrorist cogs that can be made to spin in macro explanations of terrorism and used to mobilise the determination to fight them at all cost.

Some alternative understandings of terrorism focus on terrorist groups as organisations highlighting crossovers. For example Flanigan shows how the tactics employed by the Mexican drug cartels are similar to those of recognised terrorist organisations such as Hamas and Hezbollah (Flanigan 2012). The focus on groups is also evident in some strands of the literature focusing on group psychology (Tsintsadze-Maass and Maass 2014). Yet the field is split on psychological approaches. The focus on the psychology of ‘irrational’ terrorism brings us closer to the individual terrorist, but many psychological explanations continue to focus on the making of the terrorist in the build up to the incident. (Rather than in the immediate aftermath as I am trying) Furthermore psychological studies of terrorists are “virtually unanimous” in their assessment of terrorists “primary shared characteristic [being] their normalcy” (Richardson 2007, 14). The conspiratorial literature which we have briefly encountered above aside there is a legitimate share of the literature which focuses on individuals becoming terrorists due to the framing by security organs. This has been a hot topic in the context of India particularly in respect of the attack on parliament on 13th December 2001 (Roy 2006).

Of course there is another literature that plays a role here, this literature focuses on processes of law, articulations of social realities and the production of facts through the crafting of chains of references. The immediate aftermath of the incident and the legal process, through which the terrorist is determined, involves an array of actors who are invisible in standard accounts of terrorism. To

venture into the non-standard accounts, building on ANT and Latour's seminal study of the Conseil D'Etat the role of files, circulations and associations can be made visible. (Latour 2004) Further the role of early conversations between actors in determining the path of a case and its facts adds to the layers of circulations visible. (Scheffer, Hannken-Illjes, and Kozin 2007) Ultimately the co-articulated terrorist taking place between security and law requires a look at the accounts the actors themselves deliver of their role in this process. It becomes clear throughout this study that while building on Latour's ethnography of the Conseil d'Etat gives us a tremendous leg up in tracing the terror court assemblage there are elements here which go beyond the slow, hesitant and deliberate passage of law described in his study. Therefore, while building on Latour, I do not zoom in on the processes described at length by him and his disciples, but rather use those processes as juxtaposition to what we observe in the TCAs under scrutiny to focus on the interplay between modalities of law and modalities of security.

1.11 Field Diary Entry: 20/03/13 11:15

Occasionally a major spat develops but otherwise the judge, slowly and calmly dictates his translation of the witness statement. While it is tempting to only follow the slow droning voice of the dictating judge, it is clear that in the process of translating the bursts of sentences and fits of words, coming from the witness in reply to the prosecution prompts or the judges questions, are not only changed in tone by the translation taking place. While the judge checks back with the witness from time to time to ensure that the words used are understood and clear to them as well the cacophony of prosecutorial suggestions and the objections of the defence lawyers is creating such a din that the judge has to intervene repeatedly to ensure that the accused are still able to hear and understand what the witness is saying.

1.12 Methodological Relevance

Understanding the mechanics of terrorist becoming in the light of assemblage thinking also has a methodological impact. Assemblage thinking allows us to look at the process of making the terrorist in the court. It also allows us to understand the role objects play in the

stabilisation processes taking place and how the terrorist can be stabilised beyond the moment of terror that is the incident. Assemblage thinking is the amalgamation of Actor Network Theory (ANT) and assemblage as used by Deleuze and Guattari. “Conjoining the two approaches [...] brings the tried-and-tested ANT toolbox of concepts to bear on empirical studies of the emergence of order and disorder in a more-than-human world” (Müller and Schurr 2016, 226). Using the Court as the location for tracing the assemblage allows the temporal delineation of the case studies as specific legal cases with a beginning and an end. The court setting allows us to circumscribe our actants and to look at a more or less contained process in which nevertheless pressures from society, state, international and religion are reflected.⁴⁷ Furthermore the Courts are a likely starting point for this investigation because they are often perceived as arbiters and makers of societal truth (Fennell 2013; Dasgupta 2006). Using the court as a space for the containment of the case study also brings in an engagement with the law. This in turn allows me to use the definitions of terrorism in law and the benchmark for process provided by the law on procedure. The constant debate surrounding the definition of terrorism stands in tension with on one hand the often all-encompassing definition in specific domestic jurisdictions and on the other hand the coherent application that can be observed.⁴⁸ Since starting from the aggregate phenomenon to say something about the practices has not yielded satisfactory results I turn this method on its head. In this enquiry I have attempted to study up rather than down. Starting with a mind set of respect for my ‘objects of study’, interview partners and participants during my observations. The important thing to keep in

⁴⁷ These four areas of relevance build on the triangle model of plurality conscious law as developed in (W. F. Menski 2006a) and later developments of the kite. (W. Menski 2011)

⁴⁸ For debates on the definition of terrorism see contributions by (Hardy and Williams 2011; Bruce 2013; Escribano Úbeda-Portugués 2011; Golder and Williams George 2004; Greene 2014; Grozdanova 2014; Ruby 2002; Herschinger 2013; A. Schmid 2004; A. P. Schmid 2012).

mind for me was that each one there, even the illiterate Chaiwalla or the ill-tempered driver knew something about the collective I studied that I didn't. This belief, while certainly challenging at times, ties in with the naivety that ANT scholars mention frequently and with the deeply ingrained respect that serious veteran scholars bring to their work. "[G]iving an explanation should not be confused with substituting a phenomenon for a social one" (Latour 2007, 102).

1.13 Field Diary Entry: 20/03/13 11:30

At 1130 there is another unclear point in the statement of the witness, it is resolved through a debate between prosecution and defence lawyers, with the judge deciding the final version to go into the record. As I am surprised at the large amount of plainclothes people attending the court today I am told by Rajat that all of them are police officers, when I express my further surprise at the lack of uniforms, Rajat tells me that while police in principle are obliged to wear uniforms at all times on duty, there are a number of exceptions, resulting in almost nobody wearing them. The exceptions include Special Cell, CBI and retired officers.

1.14 Plan

In order to make my argument in this thesis I am proceeding in eight chapters. This introduction is chapter 1.

Chapter 2 combines insights from assemblage thinking with elements from Actor Network Theory to set the theoretical frame for this work. It deploys my own theoretical device, the Terror Court Assemblage to understand the operation of stabilising the terrorist. The Terror Court Assemblage draws on a theoretical register influenced by assemblage thinking and Actor Network Theory to gather the tools necessary for the subsequent case studies. In addition to building up our toolkit and vocabulary for the study, the second chapter also provides a first example drawn from the judgement in the Mumbai Attack of 26th of November 2008. This example helps illustrate the way in which the TCA works.

Chapter 3 turns to the role theories play in the assemblage. Far from being in competition with assemblage thinking, other theories used to make sense of terrorism play a role in the assemblage. The role of

territorialisation of the assemblage is explored and how theories play a role as actants in their own right. All four macro-theoretical directions that we encounter in the chapter - systems theory, critical legal studies, exception/emergency and sovereignty, power and governance - play roles in the assemblage. Brought in by actors themselves they play a role in shaping and influencing their causality expectations, their perception of legitimate actors and the roles they play, these theories leave traces and thus have a bearing in the assemblage.

In chapter 4 the concrete method for the case studies and the fieldwork is explored. This ties in the theoretical framework of assemblage thinking with methodological implications of doing fieldwork. In this chapter, I also explore the case study approach and the tracing of actants through participant observation and interviews. The fifth chapter draws on the interviews to sketch the productive 'mess' out of which the terrorists are assembled. Drawing predominantly on the interviews, and to a lesser extent also on the participant observation this chapter maps the pre-existing legal assemblage and the pre-existing security assemblage as well as the heterogeneity of the background for the Terror Court Assemblage. In this chapter I follow actants to trace the connections they are making. This juxtaposition of the confusing picture that emerges as backdrop, highlights how surprising the smoothness and stability of the emergent terrorist is. These accounts of how actors portray their own involvement in the assemblage highlight the different strategies the human actors employ to deal with distributed agency. As part of this chapters the actors interviewed also speculate on the elements of the chain of reference which articulates the terrorist facts that run counter to the expectation of the passage of law. Therefore their contributions highlight the role that modalities of security, quick, prehensile and reactive play in shortcutting the slow, deliberate and hesitant legal detour. These speculations are by no means uniform, but the themes of detour/shortcut and slow and deliberate/ quick and prehensile are reoccurring, shedding some light on the micro

stabilisations taking place during the crafting of the initial chain of reference.

The first case study in chapter 6 explores the becoming terrorist of Nasir. Drawing mainly on the judgments and my participant observation this chapter follows the series of stabilisations and translations that lead to the emergence of Nasir as terrorist. Despite the incident for the Nasir TCA taking place in 2002 whereas the incidents for the Aftab TCA took place earlier in 1997/1998 I begin with Nasir because the choreography involved is slightly less complex. Nasir is stabilised in a series of translations and connections but there is only a single incident in respect of which he is stabilised as terrorist.

In contrast the seventh chapter turns to the stabilisation of Aftab. In the Aftab TCA a number of incidents are established as a series before actants are successfully choreographed to stabilise Aftab as terrorist. This case study is more complex than the first due to the greater number of moving parts. It reinforces the role of actants for the stabilisation of terrorists as well as the tensions between the pre-existing legal assemblage and the pre-existing security assemblage. These tensions are overcome through a successful choreography of relations, which stabilises Aftab as terrorist.

Following a brief summary of the argument, the conclusion in chapter eight provides an outlook that goes beyond the stabilisation of terrorists in the Terror Court Assemblage. In this chapter I offer some thoughts on the theoretical and practical implications of this work for future research and policy evaluation. Not only does an opening of the black box of the terrorist allow a better identification of avenues for intervention but listening to actors' speculation shows the tension between the scripts and modalities drawn upon. Drawing on the work of Kyle McGee it becomes clear that in the co-articulation of the pre-existing legal assemblage and the pre-existing security assemblage normative tensions arise. (McGee 2014) Tensions which result in some surprising shortcuts in the otherwise slow and meandering chain of reference that the TCA uses to make the

terrorist facts speak for themselves. These shortcuts where the passage of law as we know it from Latour would lead us to expect detours are only visible when paying microscopic attention to the crafting the chain of reference at the lower courts. Each vinculum, linking an insignificant event to a body of texts, has to be scrutinised to see how, when these micro-stabilisations are bundled together they result in chain links, the stability of which we would struggle to explain purely by recourse to the modality of the passage of law. Drawing on this observation and on the actors' speculation in the interviews I bring out the tension between modalities of law and modalities of security in articulating the assemblage and ultimately making the terrorist fact speak for itself.

1.16 Field Diary Entry: 20/03/13 11:45

There is some commotion, the room is sealed and the nervousness of the police officers visibly increases. Before I can ask what is happening, I can see one plainclothes officer carrying two Tupperware boxes, with yellow lids and so much brown postal tape around them that they look like misshapen bees. The officer shows the boxes first to the reader and then presents them to the witness who under the supervision of the judge and the Argus eyes of the defence breaks the little leaden seals and begins to unceremoniously unwrap the brown tape. By now Rajat has whispered to me that this is the bomb that did not go off. After glancing at the bomb the judge is satisfied that it was indeed put there at some time after it was recovered by the bomb disposal squad and that it is the same bomb as the one the expert put in the box. While there are complaints from the side of the defence that the chain of custody was broken, that it was not sealed properly and immediately, the judge dismisses this and records only the identification of the witness. While this is going on, the seal on the room has been lifted, and whereas the bomb is still sitting on the desk in front of the judge, there is a constant trickle of defence lawyers into and out of the room.

1.17 Wider Outlook & Link Chapter II

The contribution of showing how a terrorist is made and maintained sidesteps stuck debates about definitions, positionality and politicisation of terrorism while at the same time opening the black

box of the terrorist. The far-reaching effects that accepting someone as terrorist has, should make everybody extremely cautious about taking the terrorist as reified category for granted. Knowing that the black-box of the terrorist can be taken apart to look at the mechanisms normally hidden within does away with getting stuck in rhetorical deliberations about one man's freedom fighter being another man's terrorist. Nevertheless in order to illustrate the power dimensions of the successful assembling of a terrorist we should be weary of following other broad-brush explanations of macro phenomena, from theology, psychology, sociology or even military strategy. Through this inquiry I illustrate how step by step the stabilisation of the terrorist remains precarious until the point when it is successful and then conceals the process of its own making. The case studies are specifically from India, but the mechanism of stabilisation, whether it works through the courts, the media and parliaments or within a family or group of friends follows similar patterns. More importantly while the case studies are very specific, microscopic choreographies, it is through many processes like the ones described and analysed that terrorism gains its current form. Finally, showing in two examples, that terrorists are not inputs for processes in courts but their outcome has consequences for the ways in which we as a society conceive of our strategies to minimise the number and impact of terrifying incidents in our midst.

Chapter 2 – Assemblage Thinking and the Terror Court Assemblage

2.1 Terrorist Assemblages

In this chapter I explore assemblage thinking and actor network theory and begin to set out the tools required for tracing the making of terrorists in Indian courts. In the process of doing this assemblage thinking originally associated with the works of Gilles Deleuze and Felix Guattari (e.g. 2004b) is brought into tension with Actor Network Theory (ANT) chiefly associated with Bruno Latour.⁴⁹ This chapter also touches upon and draws from other interpretations including the works of John Law, Kyle McGee and Thomas Scheffer. Fundamentally assemblages and ANT emerge out of the same intellectual tradition. Their most important contemporary intellectual siblings include science and technology studies (STS).⁵⁰ Some controversy exists regarding the relationship between ANT and assemblages. John Law is one of the primary champions of their similarities (John Law 2008). Whereas Graham Harman regards Deleuze and Latour as pursuing separate interests, the first in flux and flow and the latter in specific entities (Harman 2009, 30 & 31). To pursue an inquiry into the making of the terrorist requires theory and method to be attuned to both circulations in flux and the working of specific entities. Therefore I follow the example of Martin Müller and Caroline Schurr who are amongst the latest to focus on “the fertile space in between” ANT and assemblages instead of getting bogged down in their differences (Müller and Schurr 2016). Out of this fertile space I assemble a toolkit that draws from both Assemblages and ANT focusing on *faire-faire*, *making-do* and

⁴⁹ The acronym ANT is how most ANT scholars refer to the theory. A great discussion of the problems with the naming of the theory and the acronym can be found in (Latour 1999).

⁵⁰ There is some overlap between Assemblages, ANT and STS, but to explore the making of terrorists in Indian courts STS is only of peripheral importance.

making-speak. Using this toolkit I can trace the chains of references that articulate the terrorist through the Terror Court Assemblage. Going beyond the processes of detournement and hesitation of Latour's seminal 'La Fabrique du Droit' I zoom in on the tensions and stabilisations that give rise to the judgment in which terrorist facts speak for themselves. (Latour 2004) To achieve this I turn first to the literature on ANT and Assemblage, before sketching the Terror Court Assemblage as my frame of reference and linking it to examples from the 2008 Mumbai Attacks.

2.2 Actor Network Theory

Predominantly coined by Latour, ANT developed out of his sociology of associations. As a theory therefore its ambit is much wider and more fundamental than the legal field although there are fruitful applications of ANT in law as we will encounter below. The first concepts to be drawn from ANT are relational materiality and performativity (John Law and Hassard 1999, 4). These two concepts are prerequisites not only for the working of ANT but also for the central claim of this thesis that the concrete Terrorist is made after the dust settles and not prior to the explosion. Our attention is therefore drawn both to the relations in which the terrorist arises and the performance that is required to maintain stability. The third key concept that I explore in this section is translation. As a final step in this section I turn to some limitations of ANT and what they mean for this project.

2.2.1 Relational Materiality and the Anchoring Chain of Reference

Starting from a common point of departure with assemblage thinkers John Law sets out one of the first elements of ANT.

[In] a ruthless application of
semiotics [ANT] tells that entities take
their form and acquire their
attributes as a result of their

relations with other entities. In this scheme of things entities have no inherent qualities: essentialist divisions are thrown on the bonfire of the dualisms (John Law and Hassard 1999, 3).

Following this insight it has to be conceded that the terrorist does not exist out there as an essential entity waiting to be unveiled. In the absence of stable circulations of meaning no terrorist exists. However and this is very important:

[I]t is not in this world-view, that there *are* no divisions. It is rather that such divisions or distinctions are understood as *effects or outcomes*. They are not given in the order of things (John Law and Hassard 1999, 3).

So while there is no *essential* terrorist naturally occurring in the order of things, terrorists do exist and are stable blocks of our everyday life. They come into being and are maintained in existence in relation to other entities. The coming into being of a terrorist fact as a stable block that can be transported and thus used in other contexts is shaped by constant negotiations, enrolments and associations between actors. These tensions pass through trials. “Trials are ‘in the middle’ of networks: they are what occur between elements in the active negotiation of alliance-building, in this way constituting them *as* elements and are integral to the extraction of continuity from multiplicity and heterogeneity.” (McGee 2014, 4) A sequence of successful trials creates a chain of reference, which constitutes the

choreography of a fact. As the workings of the assemblage churn on this chain of reference on which the fact stands is increasingly made invisible giving rise to a seemingly stand alone fact. The fact, in our case the terrorist, speaks for itself however this fact could only come into existence through the relations that are embedded in its chain of reference. The sleight of hand, which enables the TCA to articulate the terrorist, is making invisible these chains of reference, to make the terrorist speak itself, seemingly as a standalone fact. Yet this stability only holds fast through movement, the constantly performed circulation of references. Terrorist facts therefore need to be performed.

2.2.2 Performativity and *Vincula Juris*

[E]ntities achieve their form as a consequence of the relations in which they are located. But this means that it also tells us that they are *performed* in, by, and through those relations” (John Law and Hassard 1999).

Therefore terrorists as entities with a form come into existence through the performance of terrorist relations. However this also means that:

[E]verything is uncertain and reversible, at least in principle. [...] there has been much effort to understand *how it is* that durability is achieved. How it is that things get performed (and perform themselves) into relations that are

relatively stable and stay in place.

[...] Performativity which
(sometimes) makes durability and
fixity. [...] If relations do not hold
fast by themselves, then they have
to be performed (John Law and
Hassard 1999, 3).

Continuous performance is therefore required to stabilise the terrorist. The stability that seems so elusive in the above quote is achieved through embedding the on-going circulations of terrorist performances into a wider assemblage.⁵¹ Latour introduces us to the concept of *vincula juris*, which are little bonds between insignificant events and a corpus of texts. (Latour 2010, 274) In the words of McGee vincula are “little connective/selective translations”. (McGee 2014, 163) Actors engage in making vincula to allow the passage of law and through this cause a juridification of an ecology of practices. In our case vincula create bonds between a corpus of texts, most prominent a body of laws engaged in a pre-existing legal assemblage but also of other texts, and a series of insignificant events. It is important to note here that insignificant does not mean unimportant, but rather that the event prior to the vincula does not signify itself. The event is made to speak its significance through the link with the body of text which, for example, turns an overheard conversation into the legal category of the meeting of minds. In the process of these translations “[e]verything is transformed, or re-created. The rich diversity of associations composing the very substance of things is stripped away, and a new, slimmer version – one capable of fitting in the dossier – is fashioned.” (McGee 2014, 164) So far the existent accounts of ANT in Latour and McGee, however when looking at

⁵¹ In this case the a pre-existing legal assemblage, however it is entirely conceivable that a similar project zooming in on for example policies, media, training, education etc. would produce very interesting results.

the making of terrorists in court there are gaps in the chains of reference underlying the dossier that the actors fill with reference to a pre-existing security assemblage to which we will return in Chapter 3. We have already touched upon it briefly above, but in order to have continuous performance another concept is required. Translation has taken a back seat in some aspects of ANT but is crucial to assemblage thinking. In the process of making relational materiality and performativity clearer I will have to engage in translations therefore it only makes sense to insert it here before revisiting relational materiality and performativity. Translation is even more important as I begin to investigate how relative stability is achieved.

2.2.3 Translation

The concept of translation is of continuous importance. I need it immediately here to explain the difficulty of extrapolating a position for ANT and subsequently to apply the assembled toolkit to the stabilisation of the terrorist. Translation is also necessary to account for some of the transformations observed in the case studies. Drawing on Law and Hassard, translation as I use it encompasses three components (1999). A translation is a process that makes two things that are not the same equivalent. Secondly this making equivalent has consequences. Thirdly it is a practiced process that requires work. This work is continuously necessary and while it may be more or less visible, the moment it ceases or is disturbed too drastically the translation fails. As such translations can have successful phases and unsuccessful phases.

For example sensory information is translated into an account that is then translated into evidence in the form of a witness statement. At its most basic “translation is the process or the work of making two things that are not the same, equivalent” (John Law and Hassard 1999, 8). This is a precarious process. Additionally to the risk of failure there is also a risk that the consequences of this making equivalent are unpredictable. This danger is described by John Law as *traduction/trahison* using a word play on the French similarity between translation and betrayal (John Law 1999). Translation is a

perennial part of interaction but always involves work. A simple example: Yesterday two dogs chased me. Focusing on only the simplest translation in this event, the similarity between canines was sufficient to overcome the differences between a Chihuahua and a Rottweiler. The material differences not only of a very small and harmless dog and a very large and dangerous one, but also of the very different experience of being chased by one were made equivalent by translating both into dogs. The similarities are highlighted and the differences suppressed. This example is extremely simple yet the simplicity does not mean that we are talking about mere labelling here, translation, despite its common usage is not limited to a separate linguistic realm. Both in ANT and in assemblage thinking material and symbolic expressions coexist heterogeneously, preventing translations from privileging one over the other. Another example can perhaps help to make this clearer. In a seminal article about the scallops of St Brieuc Bay Michel Callon defines translation as “a general process [...] during which the identity of actors, the possibility of interaction and the margins of manoeuvre are negotiated and delimited” (Callon 1984, 6). Translations occur between the scallops, oceanic currents in St Brieuc Bay and the new technologies introduced by actors. The human cannot be privileged over the non-human and by extension translations cannot be limited to a semantic realm as in labelling theory.⁵²

We now have two components for translation at hand; the first is a process of making two entities that are not the same equivalent. The second is that this process (when stable) has consequences that set the scope for ensuing possibilities. Annemarie Mol powerfully identifies a third dimension to processes of translation in her research

⁵² Callon goes on to identify instances where researchers insert themselves into the case study and translate it for their purposes. The concept of translation as I use it also has implications for my methodology as I, as the researcher, author and translator of this inquiry must constantly remain aware of the translation that I am engaging in.

on how three different instances of arteriosclerosis⁵³ are more different than the textbooks suggest (Berg and Mol 1998). Their work contributes to translation as they show how the practitioners *make* links over differences, through hard work, in order to achieve an important end. She reaches the conclusion that ultimately “practices are all we have, that there is nothing above or underneath them” (Berg and Mol 1998, 163). These enacted and enforced links stand in contrast to the “nice [...] smooth story [in which] One thing leads to another. There are correlations [...] between different aspects of arteriosclerosis, which are all, to be sure, expressions of the underlying disease. It is a nice smooth story, but not one that necessarily works in practice” (John Law 1999, 9). The pinnacle of translations is the operation of a blackbox. “[T]he black box is said to act as a single unit and prevent other actors from glimpsing the working of its parts – or even *that* it possesses parts. It receives an input and produces a fully predictable output.” (McGee 2014, 7) Translations that occur inside of the black box are removed from view and scrutiny. Far removed from the initial example about the two dogs it shows the continued importance of translation as a concept. It is important to keep in mind the three components of translation as I begin to *make* the links between ANT and our own exercise in assemblage thinking. In doing this I am making two things, which are not the same equivalent. I am setting in motion a process that sets the scope of the possible findings for this research and for the sake of practicalities I am working to *make* links. I am translating ANT into the project and need to ensure not to betray any part in the process. Equipped with these new analytic tools and the warning about *traduction/trahison* I can begin by translating relational materiality and performativity.

⁵³ If one looks in the dictionary Arteriosclerosis is a disease of the veins. However Mol’s point is that it really is either a bundle of symptoms suffered by patients and translated by the physician or traces on the microscope of the pathologist and that although we maintain continuity between those two they are mutually exclusive.

2.2.4 Relational Materiality and Performativity Translated

What does John Law mean when he says, “that entities take their form and acquire their attributes as a result of their relations with other entities”? (John Law and Hassard 1999, 3). His question requires translation to become immediately relevant to this inquiry. To generate new insights about the making of terrorists let me first return to our acquaintances the two dogs from above. One of them was a very small and harmless Chihuahua and the other one was a very large and dangerous Rottweiler. The simplest insight from relational materiality is that very small and very large only come into existence relationally. Equally the Chihuahua is only harmless in relation to a fully sized human being, or perhaps in comparison to a Rottweiler. This insight is neither particularly novel nor ground breaking. It becomes more relevant for this inquiry by extending it to the often-used adage that ‘one man’s (A) terrorist (C1) is another man’s (B) freedom fighter (C2)’. So what are we talking about? We have three people: A, B and C. In the relation between A and C, the latter becomes terrorist (C1). In the relation between B and C, this is different and C2 becomes a freedom fighter. In a universe consisting solely of A, B and C and the researcher, and containing only two avenues of categorisation, terrorist and freedom fighter, the inquiry would more or less predictably conclude with the above-mentioned adage.

However, we find ourselves in a world populated by a significantly larger number of people, interactions amongst countless actants (human and non-human actors) draw together and fall apart in precarious and contingent relations. Relations are precarious, i.e. they can fail. This is not to say that relations are interrupted completely, but rather that the quality of relations can change dramatically to the point where the erstwhile relation is completely muted. So for example the most common relation between people and newspapers is one of information translations. It is the news part of newspaper that is in the foreground. Newspaper is also an excellent fire starter however and so the relation between person and newspaper could

also privilege the paper aspect of the newspaper and use it to get the BBQ started. A newspaper is neither essentially an extension of the voice of the editors and journalists nor is it essentially a fire starter.⁵⁴ However it has the capacities to enter into sets of relations in which it becomes one or the other. The realm of virtual capacities is only suspended in the actualisation of particular relations. That ‘relations are precarious’ means that the actualisation of a particular relation is not the default in and of itself. However in a specific network of relations certain propensities are facilitated whereas others are made more difficult. If we assume for simplicity’s sake the Rottweiler’s disposition makes it a fifty-fifty chance of either enduring my investigation in a docile manner or of chasing me around the block then both relations are equally likely. However if we introduce another set of actants, for example concepts of ownership, liability, public health and safety regulations, a dog owner, the state as well as a leash and collar, then it becomes much less likely that the dog will have a chance at chasing the researcher. There is however one big caveat. I would argue that the researcher could not any longer responsibly claim to be studying anything about the dog without taking into account the assemblage in which the ‘studyable’ dog becomes possible. This interrelation between networks of continually working precarious relations is what I mean by contingency. The dog as object of study is contingent on a host of other relations, changes in which affect other relations in the network. The assemblage dog-as-subject-to-public-safety-regulations interacts with the assemblage canine-hunter-human-prey making dog-as-object-of-study actual. In addition to these relations being precarious and contingent the example illustrates one more thing. In assemblage thinking actants are not limited to actors as traditionally understood in most other

⁵⁴ This draws on an ontology inspired by Meillassoux and Harman. One of their points, which is of importance for this inquiry, is that while entities have an essence this essence does not interact and is therefore not something accessible to the senses, properties, capacities, forms and attributes are real and accessible but only come into existence relationally to an other entity.

theoretical frameworks. Rather assemblage thinking refuses the a priori delimitation of action to the “ ‘intentional’, ‘meaningful’ [that] humans do” (Latour 2007, 71). If we go back to our example of the dog, if the owner holds the dog back from attacking the researcher with a leash this changes the relations between the three. Following Latour’s logic, the leash is an actant, as holding back an angry but leashed Rottweiler is not at all the same thing as doing so with your bare hands. The leash is in this case an actant; its participation in the action changes something important about the action. This is not the same as claiming causality. “ANT is not the empty claim that objects do things ‘instead’ of human actors: it simply says that no science of the social can even begin if the question of who and what participates in the action is not first of all thoroughly explored, even though it might mean letting elements in which, for a lack of a better term, we would call *non-humans*” (Latour 2007, 72). Identifying these heterogeneous, human and non-human, actants is a part of the scientific enquiry rather than something taken for granted. Therefore, for the purposes of our inquiry, we have to keep an open mind to interrelations between heterogeneous actants. Nevertheless interrelations between humans and non-humans are not the core focus of this enquiry, having been done at length in *La Fabrique du Droit* rather the focus here is on how the terrorist is made to act, speak and emerge as a stand-alone fact in the judgment. This requires us to remain attuned to interactions between humans and non-humans but to build on these associations while zooming in on something else. The focus is on the joint crafting of the terrorist fact between the slow and deliberate passage of law with its hesitant modality and the fast, prehensile and shortcut prone modality of security.

Despite this dramatic increase in complexity we are faced with relatively stable categories of ‘terrorist’. True enough, they are contested at the edges and change over time. Individuals and organisations move through transient phases of terrorist relations with their surroundings. The African National Congress, Hezbollah,

Pablo Escobar, Anders Breivik, the PLO and Mac Maharajah are just a few examples of actants that have transiently been in relations in which they were terrorist. (As well as political, criminal, insurgent, revolutionary) Yet despite examples of transience terrorist relations are often persistent and widespread. Actors such as Al Qaeda, Lashkar-e-Toiba, Abu Sayyaf Group, Boko Haram, Al Shabab are terrorist in their relation to large swathes of the mainstream public, media and academics.⁵⁵ Again, I am not making an essentialist argument about what these entities are, but only about what they are in relation to other actants. In the absence of a consensual definition of terrorism that could be consulted to decide who is a terrorist and who isn't, terrorist relations are surprisingly stable. That relations can be transient but can also be relatively stable is a result of the next aspect of the assemblage approach. In assemblages relations need to be performed. Actants are the performance of their relations with other actants. This performance is inherently contingent and precarious but can be stabilised through translations. Keeping in mind the definition of translation as "a general process [...] during which the identity of actors, the possibility of interaction and the margins of manoeuvre are negotiated and delimited" (Callon 1984, 6). How does the performance of relations work which results in stable, widespread and persistent A – C1 type relations (Terrorist) and suppress B – C2 relations (Rather than to stick only with the freedom fighter example here, B – C2 relations can be all relations in which C is not terrorist). In this respect assemblage thinking offers an avenue, which bypasses the agency versus structure debate. We cannot explain C1 the Terrorist solely based on their position in a system/structure nor should we consider them a fully autonomous free agent who can turn around what they are with a single conscious decision. This assemblage account is close to discursive accounts but differs slightly methodologically as it only follows the traces of

⁵⁵ On example which is particularly pertinent in the Indian context is that of the Maoists/Naxalites whose position is continuously redefined between terrorist and insurgent (Misra 2002; Rajagopalan 2007; N. Goswami 2014) and (Jeffrey, Sen, and Singh 2012).

actants and recognises the important role non-humans play as actors and mediators.⁵⁶

2.2.5 Critiques and Limitations of ANT

Traditional ANT accounts do not customarily rely on interview evidence in tracing their networks and following their actants. As such the role that interviews play in this thesis goes beyond a traditional Latourian exploration of the passage of law. The inquiry here builds on Latour and ANT to the extent that we arrive at a point of puzzlement. When tracing the TCA we are able to follow the meandering detours of the passage of law up to the point when we encounter a surprising shortcut. The chain of reference is seemingly interrupted and legal actants, which we would have expected to be connected, articulated and inflected, are left seemingly as a loose end. This we have to then consider in juxtaposition with the stable facts of terrorism. The chain of reference cannot be interrupted as it functions to articulate the terrorist facts and makes the terrorist speak. The interviews are included to allow the participant actors to speculate on these lacunae in the expected chain of reference and to shed some light onto how the actors themselves make sense of the heterogeneity between modalities of law and order, which we expect, and modalities of security, which are surprising when encountered during the passage of law. The TCA is unique in this sense as it includes these modalities novel to the passage of law as described by Latour and the interviews allow us to use a different angle to shed some light on the apparent gaps in the chain of reference. Other challenges to ANT remain of course from other perspectives.

⁵⁶ Foucauldian discourse theory as well as other discursive traditions should be understood as parallel rather than antagonistic projects to this one. Deleuze himself published on overlaps between their theories (Deleuze 2006). The usefulness of the actor network lies in its analytic toolkit as well as the role of objects, inscriptions and diffuse causality which make it a very good fit for analyzing legal proceedings. While there are abundant readings on bio-power in terrorism studies, there is a relative dearth of scholarship on Foucault and the law, excellent exceptions include (Golder and Fitzpatrick 2009).

2.2.5.1 Challenges Arising Internally from ANT

Internally Actor Network Theory is deeply ambivalent as it tries to reconcile two contrary pulls, between generalizability and concreteness. The weight of academic practices, such as those aimed at making theories transportable and generalizable, exerts a gravitational pull on ANT. As a result it has been condensed into a nameable, transportable and centralised Actor Network *Theory*.

For the naming of the theory, its
conversion into acronym, its rapid
displacement into the textbooks, the
little descriptive accolades – or for
that matter the equally quick
rubbishings – all these are a sign of
its respectability. Of its diffusion.
Or, perhaps better, its translation
(John Law and Hassard 1999, 2).

The other pull exerted on assemblage thinking is the *Fliehkraft*⁵⁷ of assemblage as a living thought practice. Deleuze and Guattari use the metaphors of arborescence versus the rhizome, or territoriality versus nomadism to describe “the tension between centring and displacement” (John Law and Hassard 1999, 2). *Fliehkraft* highlights the force of flight, the propensity of bodies to escape. We can understand celestial bodies, like the moon, as balanced in equilibrium between the centrifugal force of their orbit and a gravitational pull, in the moon’s case of the earth. If that equilibrium is upset in one direction or another the celestial body comes crashing down or loses itself in empty space. Assemblage *thinking*, has a force of flight, which is constantly capable of interaction and re-arrangement, elusive and impossible to pin down by the gravity of academic circumscription

⁵⁷ Its literal translation from German is force of flight, as in escape.

exerted by actor-network *theory*. Making it crash down to earth surely makes for easier inspection but makes it impossible to observe it in flight. The thesis needs to be maintained in a more or less stable orbit. The gravitational pull of academic practices enacted in actor network *theory* is needed to keep the argument in sight of known academic ground. The force of flight of assemblage *thinking* allows the observation of the role of objects/actants in the uneasy fusing of a security assemblage and a rule of law assemblage in the terror court assemblage. The underlying tension that John Law has described as “the performance of an irony” in the making “of a fixed point in order to argue *against* fixity and singularity” runs through this entire work (John Law and Hassard 1999, 3). It is not a tension we can avoid and therefore we can only acknowledge it and occasionally revisit its implications throughout the course of this inquiry.

Now, to perform the irony, we need to look into two questions. First, what is assemblage thinking? Second, how can we use it and to what end?

While building on Deleuze and Guattari the most important influence of this work is from Latour. In his *La Fabrique du Droit* Latour diligently traces the passage of law through the meandering hallways of the French *Conseil D'Etat*. Much more than merely an account of French administrative law his study forces us to consider the role of non-human actors in speaking the law. The focus on files, shelves and the mundane objects of organisation such as paperclips and rubber bands is skilfully paired with an account of manners of speaking which creates vincula between insignificant events and a corpus of texts to articulate the legal means (*moyens*) and facilitate the emergence of legal facts. (Latour 2004, 183) Rather than to emulate this method too closely or to attempt to replicate his findings in the context of the TCA, I am building on this concept of the passage of law as the expected element of the TCA. Yet the emergence of terrorist facts, an articulated terrorist made to speak for itself through the TCA, includes components, which are surprising in their modality. The manners of speaking highlighted by Latour for the

passage of law are slow, meandering, hesitant and marked by detours. In contrast throughout the articulation of terrorist facts we are time and again confronted with a modality of security, quick, prehensile and prone to shortcut if not short-circuit the modality of law. The challenge therefore is to allow both modalities to co-exist in our account of the chain of reference which articulates the terrorist.

Both DeLanda's *Assemblages 2.0* (2006) and subsequent ANT are relevant to this work to some extent, yet critiques of both interpretations of assemblages highlight important limitations. This is relevant for this thesis because despite having achieved a centre stage position in social theory assemblage thinking and its contemporaries are still occupying a niche in the study of law.⁵⁸ The limitations therefore are all the more relevant, as assemblages in law still require novel translation and a maverick spirit.

2.2.5.2 External Challenges to ANT

Externally assemblage thinking and ANT are criticised for a host of reasons. There are two challenges to that need to be acknowledged because of their relevance to this inquiry. First, findings in ANT are hard to come by, as they require the following of actors over some time. Despite this dedication of time and resources there is no guarantee that ANT will turn up a novel or surprising conclusion. The meticulous following of actants and their traces is slow work. This is relevant to this project because the terrorists often are so fast moving, developments unfold at high speed, but the focus of the research needs to remain on the two cases studies.

The second challenge is that even if the findings produce a novel and interesting conclusion, ANT does not offer itself for generalisation per se. While the conclusion in chapter 8 provides a forward-looking perspective, ANT is not the right tool to gain predictive power over

⁵⁸ Important forays of course include Latour's seminal works that are however more often approached from a sociological or anthropological direction rather than by self-identified lawyers, for scholarship firmly established in the law schools see for example works by Alain Pottage and Yan Thomas.

actants. It may however help to make the basis on which other people base their predictions a little bit sounder. To achieve this method is absolutely crucial.

2.2.5.3 The Troubled Line between Theory and Method in both ANT and Assemblages

“[A]ctor-network theory is about *writing accounts* of performances, actions, utterances.” (McGee 2014, 47) Further significant contributions by Ian Buchanan (2015) and John Law (2004) advocate that the separating line between theory and method has to be problematized and questioned. In applying assemblage thought to terrorism trials in India this thesis draws on assemblage thought to fine-tune theoretical foundation and methodological approach so as to allow the actors I encounter to draw the boundaries of relevance themselves. These boundaries of relevance are not always what I would have expected. The surprise of the researcher is something which has to be taken into account, when we focus on the crafting of chains of reference (facts). The chains of reference crafted through *vincula* articulate the judgment in a way which allows it to speak the law (*dire le droit*) in Latourian ANT. However in the TCA the judgment is a co-articulation of law and terrorism. The judgment makes the Terrorist speak, their motive, intent, background and wider context are all articulated through the judgment. Terrorist facts are made to speak, in tracing this passage we encounter moments of surprise. Instances where from our understanding of Latourian ANT we would expect *detournement* and hesitation, but instead of the “uncertain, meandering, twisting, and unsteady path toward the threshold or point of no return called decision or judgment” we encounter a shortcut. (McGee 2014, 138) In chapter 5 the interviews allow actors to speculate about the factors contributing to the messiness and unpredictability of co-articulating the terrorist through a TCA. Applying assemblage thinking is not without its pitfalls.

[A]ssemblage theory makes two
kinds of error in their appropriation

of Deleuze and Guattari: (1) it focuses on the complex and undecidable (Actor Network Theory); and/or (2) it focuses on the problem of emergence (DeLanda).

Ian Buchanan goes on to argue that assemblage is actually better understood as a “working arrangement” (Buchanan 2015, 383) one which is not static and in which work should not be understood as mechanic causality.

In other words, the obvious mechanical explanation of various machines is precisely *not* what Deleuze and Guattari had in mind when they conceived of the concept of the assemblage and its forerunner the desiring-machine (Buchanan 2015, 384).

In the context of a legal assemblage the fallacious mechanistic understanding would be to attempt to understand the court as a machine with procedural law as its rigid blueprint. This thesis distances itself from mechanical understandings of both the court and the law in favour of treating the specific court as an assemblage, in the sense of a working arrangement. The complex, the undecidable and the emergent play a role in the understanding of the Terror Court Assemblage (TCA), however giving heed to Buchanan’s warning none of them is given primary focus aimed at making a generalisation in this work. Instead the specific, contingent and unpredictable takes precedence over the general and deductible.

2.3 Totalities and Assemblages

India is a country with a long history of counter-terrorism laws. These together with other actants form old and new conceptual lines. These conceptual lines include for example understandings of law and order reaching back to well before independence, conceptions of security drawing a link between colonial administration and currently disturbed areas. These lines change their configuration. Apparently coming together in direct consequence of the shocking attacks and their global aftermath to poly-causally give rise to conceptions of terrorism. Both the assemblage and its predecessor the rhizome are theorised in elusive and non-linear fashion by Deleuze and Guattari a rhizome first stands in contrast to the “classical conceptual architecture” in order to allow “immediate connections between any of its points” It is therefore a way of thinking and presenting thoughts that stands in contrast to traditional forms of arguing a single point in a more or less linear fashion. While being preliminary to assemblages this point has implications for this project that transcend the divides between theory and method, writing up and researching. Using the idea of the Rhizome, and this holds true for its successor the assemblage, enables an appreciation of relations that is not limited to mono-causal claims of cause and effect. Later and even more evasively the idea of the assemblage is most often defined through what it is not. Or perhaps rather through what it does instead of what it is. We can start by putting three key concepts into context. Assemblage thinking:

“Offer[s] a detailed and complex
‘open system’ which is
extraordinarily rich and complex. A
useful way into it is to follow the
concepts of coding, stratification
and territorialisation. They are
related in the following manner.

Coding is the process of ordering matter as it is drawn into a body; by contrast, stratification is the process of creating hierarchal bodies, while territorialisation is the ordering of those bodies in ‘assemblages,’ that is to say, an emergent unity joining together heterogeneous bodies in a ‘consistency’”(Smith and Protevi 2013, 4.2).

Importantly the bodies ordered in the assemblage come together and form something that is more than merely the sum of its parts. Assemblages have emergent properties (DeLanda 2006).

2.3.1 Relations of Interiority and Exteriority

Understanding the difference between relations of interiority versus relations of exteriority is required as a preliminary step to make sense of the Deleuzian theory of assemblages as interpreted by DeLanda. In relations of interiority the components do not have an independent existence. They can be fused into a seamless totality. For example Terrorism/Counter-terrorism are in a relation of interiority as neither one of them can exist without reference to the other. This may be a controversial point in respect of terrorism as some may argue that terrorism has an existence independent of its relation to counter-terrorism. Yet while all can imagine an incident of terrorism without an appropriate counter-terrorist response, what becomes terrorism, as contemporarily understood, requires the backdrop of counter-terrorism, appropriate or inappropriate, as it would stay an atrocity or even an incident in its absence. Terrorism and counter-terrorism constitute the terms of their relationship without an independent existence. Their relation defines their properties and

their identity; therefore they can be fused into a totality. As such they give rise to emergent properties, but are not decomposable.

In contrast an assemblage incorporates relations of exteriority. These are relations where the actants retain properties and identities independent of the specific relation in question. Importantly when in an assemblage, that assemblage remains decomposable and does not cease to exist when components are taken out of a specific relation. The components interact but they retain their own identity. Most assemblages contain actants that stand in relations of interiority as well as exteriority. This also means that components/actants feature in more than one assemblage all the time and that each assemblage is heterogeneous not only in terms of its actants, but also in terms of its relations.

2.4 The Tools Of The Assemblage

Laws against terrorism are a controversial topic, in India as much as anywhere else. The multi-layered critiques aimed at the intersection between law and order, security and terrorism come from all sides of the political spectrum. Often the critiques are in opposition to each other, questioning laws for an abundance of something the lack of which is criticised by the next person. Assemblage thinking provides two ‘parameters’ that impact and reflect the relations between components allowing me to chart these critiques. The two parameters are territorialisation and coding (DeLanda 2006). These two parameters can be understood as reflecting the critiques along two axes – two different directions of territorialisation on one and different degrees of coding on the other. These two axes stand in tension with each other. In the next sub-sections (2.4.1 and 2.4.2) I explore what this means for this inquiry. The final section of the chapter (2.8) specifically turns to how the critiques of terror laws can be mapped along these two axes as they undergo competing deterritorialisation/reterritorialisation pressures – between security and law and order.

2.4.1 Territorialisation

The degree to which an assemblage is territorialised/deterritorialised describes the strength of delineation of the assemblage. A highly territorialised assemblage sometimes called strata by Deleuze and Guattari, is one that has clear boundaries whereas a deterritorialised assemblage is in flux (Young, Genosko, and Watson 2013). The differentiation between relative and absolute deterritorialisation can be understood in relation to the subsequent re-territorialisation. Some form of reterritorialisation immediately follows relative deterritorialisation whereas absolute deterritorialisation is a more permanent breaking down of boundaries. In relative deterritorialisation no radically deterritorialised spaces exist, only shifts in the boundaries of different territorialisations. In this thesis I

always mean relative deterritorialisation when I use the term deterritorialisation.

It is not as so many have argued; that a new form of political violence entered the fray on 9/11.⁵⁹ Nor is it that the responses to this ‘new’ terrorism have changed the world by making it more or less secure, more or less free. Rather the political rhetoric, academic discourse and contributions of counter-terrorism-experts have combined conceptual lines in new configurations through terrorism. These lines of reasoning are in tension within the law and order assemblage that also brings together various strands of making the world intelligible. This legal assemblage is generally considered to be further removed from day-to-day politics. But it nevertheless has become a space of utterance, reinforcing a particular worldview privileging a certain territorialisation. One of the dimensions of assemblages is along the axis of territorialised/deterritorialised. The legal assemblage is generally highly territorialised, whether it is a court building or legal language it is usually clear when one enters it. In the most straightforward way we can understand territorialisation as the increasing of delineations and boundaries in physical space, illustrated by the checkpoint before the court building. Yet territorialisation also goes beyond the physical dimension and can take place in the ideational realm. Both civil law and common law traditions usually teach their students to approach new problems by linking them to an existing body of texts. Territorialisation becomes the narrowing of the possible and de-territorialisation becomes “the movement by which something escapes or departs from a given territory” (Parr 2010, 72). In other words an emergent possibility of newness could be the departing from precedence or law. In Smith’s and Protevi’s definition Territorialisation consists of “the theory of ‘territories’ or sets of environmentally embedded triggers of self-organising processes, and the concomitant processes of deterritorialisation (breaking of habits) and reterritorialisation (formation of habits)”

⁵⁹ For a good discussion of the ‘new terrorism’ theme see (Neumann 2009).

(Smith and Protevi 2013). The way in which files are compiled and circulated through the legal assemblage of the Conseil D'Etat has been explored at length by Latour and remains one of the best examples of what Smith and Protevi mean. (Latour 2010) Importantly none of the triggers by themselves give rise to territorialisation. Rather it is the circulations, for example of files, which territorialise and delineate the boundaries of the assemblage. The intermeshing between modalities of law and modalities of security also resembles territorialisation although the intermeshing of these is highly fluid. As the judgment percolates up the courts however the editing to render modalities of security, and in fact the entire chain of reference, increasingly invisible is a territorialising effect of the legal assemblage.

2.4.2 Coding/Decoding

The second parameter of assemblages is the degree of coding/decoding present. Coding/decoding relates to the way in which information entering the assemblage is processed. Assemblages are organized along the axis of coding/decoding. In Deleuzian thought, coding “performed by genes or words supplies a second articulation, consolidating the effects of the first [territorialisation] and further stabilising the identity of assemblages” (DeLanda 2006, 15). When talking about social assemblages the axis of coded/decoded indicates the presence and intensity of rules about the interactions between parts. “The more formal and rigid the rules, the more these social encounters may be said to be coded” (DeLanda 2006, 16). When speaking about courts we generally expect institutions with clear hierarchical structures, highly formalised, with specific procedural laws and strict standards of interpretation. Therefore most courts are highly coded assemblages. The identity of the court, bound up with its purpose, jurisdiction and building on the devolved authority of the sovereign is clear-cut, stable and maintained through both territorialisation and coding. DeLanda defines coding as “processes in which specialised expressive media intervene, processes which consolidate and rigidify the identity of the assemblage or, on

the contrary, allow the assemblage a certain latitude for more flexible operation while benefiting from genetic or linguistic resources” (DeLanda 2006, 19). The role of coding resurfaces in the parts of this thesis dedicated to a discussion of procedural laws in the TCA and their implementation. This role of coding and decoding is of the outmost importance, running closely parallel to the role of territorialisation and deterritorialisation in the TCA. Courts traditionally are highly codified assemblages, in which there is very little room for latitude or flexibility on the part of the components and participants. However in the case of the TCA, examples of deviation from the coding and disruption of the regular coding abound. In tandem with the deterritorialisation/reterritorialisation evident this has the potential to destabilise the working of the assemblage.

2.5 The Window on the Assemblage – Last Stop before the Terror Court Assemblage

The window on the assemblage that is offered by this thesis follows the judgment to the crafting of the chain of reference, which articulates the terrorist fact. Drawing on Latour for inspiration I zoom in on the way that vincula are used to create bonds between events and texts that form the basis for the chain of reference that makes the terrorist speak. The judgment as immutable mobile makes the workings of its own generation invisible. As part of the TCA, vincula serve to link the incidents to a body of texts which allows them to travel and inscribes a significant into them which is then choreographed into the judgment which articulates the terrorist by making them act, making them speak. Actors are crafting bridges between incidents and the body of texts, but once established the bridge works both ways. All of a sudden the text has the power to transform, judge and inform the practice. This results in tensions between detours and shortcuts. The modalities of law, detour and hesitation stand in tension with the modalities of security, shortcut and prehension. Where we expect a shortcut we find a detour and sometimes a detour leads nowhere but shortcuts to another part of

the chain of reference. The pressures of the pre-existing legal assemblage, and the pre-existing security assemblage make themselves felt exerting enrolling pressures on the actants. Human actors are aware of the occasional contradictory pulls of these pressures and my interviews touch upon their speculations on how these tensions fit together. I am employing the ANT register of vincula, chain of reference and the passage of law to show how the terrorist fact is articulated in the two case studies. The judgment is particularly important in inscribing and transporting the chain of reference which makes the facts speak for themselves, at the same time the lacunae in the chain of reference at the heart of the judgment are perplexing. The interviews serve to allow the human actors engaging in the TCA to speculate about how the lacunae arise and how they are overcome to create a stable and solid chain of reference.

2.5.1 Emergent Properties

An assemblage is more than a mere collection of parts, the parts which come together in an assemblage give rise to properties which are irreducible to those of its parts (DeLanda 2006). These emergent properties of the assemblage are what set it apart from a mere collection of things. The coming together of the parts is more powerful in an assemblage than in a mere collection of random actants that do not enter into tense relations with each other. The emergent properties coming out of an assemblage of parts can be either implicit or explicit. In the case of a court assemblage the ability to pass legally valid judgment can be understood as an explicit emergent property of the functioning of the court. The blueprint of procedural law ensures that if it is followed the judgment has legal validity, and safeguards are in place to ensure this. The judgment's legitimacy is an intangible property emergent out of the interactions of the components and of the legal assemblage with a wider social assemblage. The continuous reaffirmation of the legal assemblage as both separate from other social relations and of superior legitimacy

on the other hand is an implicit property.⁶⁰ These emergent properties are the properties of a whole, which arise out of the constant interaction of the parts; both the whole and the parts must exercise capacities. Properties have to be distinguished from capacities. While, properties are actual, they are independent of the content of our minds, even if our minds may be required for them to have meaning or to come into existence, once they exist they are actual. The blackness of the robe of the judge is a property, the heat in the courtroom, the elevation of the chair of the judge, the weight of the gavel are all properties of a specific court. Properties this court retains even it is transferred to a museum, or a TV set and the judge replaced by an actor. Capacities on the other hand, while always real can be virtual as well as actual. The court has the capacity of judging someone either guilty or innocent. Incidentally these capacities would be different for the court in the museum that instead might have a capacity to educate or entertain. However either of these capacities only becomes actual when it is exercised. Until then it is virtual in the Deleuzian sense of real but not actual.⁶¹ Capacities are also always relational. Judging requires someone to be judged. Actualised, or emergent capacities therefore by necessity are a double event (DeLanda 2012). They cannot exist without a counterpart, something with the capacity to interact (affect). Hence the capacity of the court to judge only becomes emergent when someone/thing else has the capacity to be judged. These emergent properties are novel, but they are imminent in the parts. If they stop interacting the emergent properties cease as well.

⁶⁰ For one of the earliest accounts of this see (Thompson 2013).

⁶¹ There is an ongoing philosophical dispute about Deleuzian realism and his concept of the virtual. For the purposes of this work here I use virtual as encompassing all real possibilities, including the ones that are mutually exclusive, whereas the actual is that section of the virtual which becomes actualized. Deleuze himself discusses this relation in his *Dialogues with Claire Parnet* (Deleuze and Parnet 2002, 179).

2.5.2 Material Components

An assemblage is composed of material and expressive components (DeLanda 2006). Material components begin relatively straightforward. In the case of the assemblage of an Indian Terror Court the material components would include: The building of the court and the court room, the technology in that room, air-conditioning, computers, tables, chairs, sofas, manacles, the bodies of the people present, the paper of their files, their robes etc. But it also includes the lathis, uniforms and weapons used in the investigation and enforcement of the judgments, the physical pieces of evidence, their storage and the technologies used in their analysis. The bodies of people in the street come to protest something about the case and their cardboard signs. The further afield the material components are the more it becomes obvious that understanding their relations cannot really be divorced from tracing the parts of expressivity.

2.5.3 Expressive Components

Expressive parts of the assemblage encompass the symbolic and traces based on language. For example everybody rising when the judge enters as well as the laws and the procedures recorded in law. The killing of someone in an encounter with the police also enters the assemblage as an expressive trace. That 'encounter' is an expressive part of the assemblage, as it can be understood only through reference to the ways in which the laws are circumvented in police practice. As both are expressive, another example of an expressive component of the assemblage of terror courts could be that magistrates use discretion in the application of the procedures of law, whereas they strictly adhere to the expression of the law. Expressive components are all actants that are ephemeral and concerned with meaning primarily.

2.5.4 Irreducible and Decomposable

The irreducibility and decomposability of assemblages helps me counter one specific potential criticism. Many of the tensions traced in the case studies are not unique to cases out of which terrorists

emerge. That assemblages are irreducible and decomposable means that the relevance of the findings to the making of terrorists is not undermined by parallel tensions in other trials. The irreducibility means that the emergent properties cease if actants of the assemblage are considered in isolation. Decomposability means that the parts of the assemblage under scrutiny can also be components of other assemblages as well as being assemblages in their own right. That assemblages are decomposable shows that while we are interested in looking at the assemblage that stabilises terrorists in courts that does not preclude the relevance of components also being part of other assemblages. For instance the legal assemblage as a whole struggles with corruption and incompetence, but even if this component is a part of other assemblages, it does not make it any less relevant. Very often the decomposability of an assemblage allows the researcher to make many useful connections between seemingly disconnected assemblages. However, we need to be careful lest the proliferation of assemblages continues exponentially. Courts dealing with terrorism are assemblages, which are not seamless totalities. For example laws of procedure, formulated as part of the wider legal assemblage, interact with it as components and “suppl[y] a prototype of the kind of hybrid(ising) action that is at work in ‘circulating reference’” (Pottage and Mundy 2007, 19). Those courts engaging in the making of terrorists also have emergent properties that go beyond the sum of the properties of the components. For example the assemblages giving rise to terrorists components from the wider legal assemblage enter into tension with actants from the security assemblage preoccupied with fighting terrorism.

2.5.5 What Assemblages Don’t Do and Why They Matter After All

To apply assemblage to law and terrorists is fruitful because it allows me to trace the emergence and stabilisation of the terrorist. However after the discussion above it is equally important to understand what assemblages do not do. Vexingly for most people interested in terrorism “Assemblages aren’t interested in solutions because

‘solutions’ tend to be given as representations rather than as contingent processes” (R. Kennedy et al. 2013, 62). Accordingly it is not the aim of this inquiry to provide an answer to the question of what terrorism is in the abstract. Neither on how counter-terrorism legislation can be made more appropriate to the problem. It is not even about a critique of some aspect of these laws, but rather about how courts work to interact in a wider multitude of contingent processes as part of a *terror court assemblage* which gives rise to the terrorist. The focus is on how the territorialising effects of the two assemblages, legal assemblage and security assemblage, play out in the court to stabilise concrete terrorists. Keeping in mind that “Assemblage appears to operate as an orientation to the possibility of uncertain shifts in the processes being discussed” (McFarlane and Anderson 2011, 162). The very attributes of assemblages that make them so appropriate for talking about the social world, indeterminacy, contingency and fluidity also make any account worked through assemblages heterogeneous and elusive. Yet the interesting question that assemblages help us understand is the question of who acts. That agency is distributed throughout the assemblage helps us to understand the multi-layered nature of terrorism. Ultimately the vexing question of the widespread agreement of who terrorists are in light of disagreement about terrorist definitions points us to the existence of a discriminating mechanism. Terrorists are made to speak their motive, histories and identities through an elaborate assemblage where no one actor has control or oversight. Yet this requires the crafting of a chain of reference which is then inscribed into the judgment and itself is built on vincula between insignificant events and a body of texts. The assemblage matters because it is through the assemblage that the chain of reference which articulates the terrorist fact is brought together from modalities of security and modalities of law. Whereas the latter are inscribed with increasing weight into the judgments percolating up the courts.

2.6 The Terror Court Assemblage

The Terror Court Assemblage (TCA) is the core theoretical and methodological frame of my argument. Treating certain courts as assemblages that articulate the terrorist contributes both to the understanding of what the terrorist is in practice and the functioning of courts preoccupied with matters of security. While taking place under circumstances suggest a similarity to the passage of law as described by Latour the Terror Court Assemblage is not fully coded and territorialised by the pre-existing legal assemblage. Nor do actants of the wider security assemblage completely translate the space of the courts I use as examples and case studies. Instead within the TCA a careful choreography of territorialisations, between security territorialisation and law and order territorialisation, plays out to assemble the judgment through which terrorist facts are articulated and made to speak for themselves. Using the tools of the assemblage discussed throughout chapter 2, I can then follow the traces of the actants to show the connective translations and interplays that allow the terrorist to be articulated with the weight of the law.

2.6.1 The TCA And Its Application In India

This section demonstrates the relevance of the TCA to both India and terrorism. At the same time this section makes the transition between the fuzzy concept of terrorism to the concrete terrorist.

“One may well say that Deleuze and Guattari do not call for our strict adherence to their ideas (this is certainly true), but such an argument misses the more general point Deleuze and Guattari make about concepts, that they should have cutting edges. It should always be possible to determine with

precision the specific characteristics
and features of a
concept”(Buchanan 2015, 383).

What is the concept in our case? It would be easy, and obvious, to claim that terrorism is the concept. However, there are a few difficulties with that approach. Terrorism tells an incomplete tale. It is incomplete in the sense that it does not entirely make sense standing on its own. There is no

“distinct, coherent class of actors
(terrorists) who specialize in a
unitary form of political action
(terror) and thus should establish a
separate variety of politics
(terrorism)”(Tilly 2004, 5).

We cannot fully accept terrorism as a concept, because it always remains politically embattled and positionally deployed. It is always the others who are the terrorists. Nor is it possible to understand it purely as a tactic of violence as it cannot fully be captured in the language of a military manual without discounting the normative baggage of terrorism’s use. Legal and policy definitions are consistently controversial and get us no closer to grasping the implications of their application.⁶² Understanding it by looking at the images flooding the airwaves is certainly powerful, but at best incomplete and at worst openly manipulative. Terrorism brings together various conceptual lines, drawing boundaries between friends and enemies, them and us, inside and outside, ordinary and extraordinary. When these lines come together in court, it opens a space for the retelling of one of a number of stories constituting (and

⁶² For an overview of the definitions, controversies and avenues of current definitions see (A. Schmid 2004; Scharf 2004; A. P. Schmid 2012).

re-constituting) the relationships between the citizen and the state.⁶³ As well as how these categories are constituted. Following any one of the conceptual lines that come together in terrorism too doggedly, as assemblage-as-method would inspire us to do, leads to a partial story which is inherently incomplete as each one is haunted by some unseen elements in order to make sense. Following the concrete terrorist in the making is the solution. To appreciate the extraordinary laws against terrorism is only possible through an implicit understanding of what is ordinary. Similarly grasping the moral outrage at terrorist violence brings with it an implicit yet palpable tension with the much larger number of people who ‘just’ die in traffic on any given day. The practices and codes of the legal assemblage stand in tension with the violence in the streets, the international human rights lobby and American arms sales to Pakistan, to name only a few actants in the security assemblage. All these relational tensions come together in the Terror Court Assemblage. Their kaleidoscopic combination is then choreographed and affixed, through the assemblage as working arrangement, onto a concrete body gaining a cutting edge and making them terrorist. The assemblage articulates terrorist facts through a carefully crafted chain of reference. Following the concrete terrorist in making fits well with Latour’s advice; to be careful, to stay myopic and slow in the exploration of an assemblage and to avoid drowning in a proliferation of assemblages.⁶⁴ While some aspects of the terrorist assemblage have been explored to some depth, pursuing terrorism through a terrorist assemblage has yet to make a contribution to the mainstream academic literature on terrorism (J. Puar 2007). Furthermore, the

⁶³ The connection between the exception and the relation between citizen and incomplete national is explored in (Bora 2010).

⁶⁴ The myopic and slow method is something of a theme with Latour found in many of his books and comments, but not as a limitation. Rather, being “obsessively myopic [...] allows us to see features of society, which we have taken for granted before” (Latour 1998).

application of assemblage thinking to Indian Courts engaged in making terrorists has never been done before.

This approach faces a number of challenges. First and foremost thinking through assemblages can be perceived as counterintuitive to the usual formats, methods and purposes of most of the literature on terrorism and counter-terrorism laws. It is indeed with some vehemence that the existing applicants of assemblage thinking criticize the part terrorism studies plays in creating what they call heteronormativity, white supremacy and nationalism (J. K. Puar and Rai 2002). The literature on terrorism and the laws to counter it in India is so far lacking any engagement with assemblage.

However the application of assemblage thinking to the terrorist promises insights and novel understandings. First bringing together the laws that purportedly define terrorism together with the practices and technologies that counter it enable us to open the blackbox of terrorist facticity to show the articulating chain of reference which is crafted through the TCA to make the terrorist speak. Secondly the combining of conceptual lines with the utterances they make possible make this application relevant to much more traditional areas of legal and political thought. Opening a space to subsequently question the relationship between the citizen and the state, the governance function of law as well as tense relationships between states, international structures, justice and legitimacy.

The tension between security assemblage and legal assemblage in Indian terror courts showcases how the invocation of terrorism creates the space to reconstitute the relationship between the citizen and the state. It brings terrorism to bear on law, assembling, choreographing the fusion of two grids of intelligibility, security (from the security assemblage) and rights (as one aspect of the legal assemblage) that purportedly touch upon all Indians. In other words driving terrorism home. This sweeping reach cannot be explained satisfactorily by only looking at the security assemblage, nor can it be comprehensively explained by focusing solely on the legal assemblage. It cannot be fully broached in the seemingly a-politicised

and self-referential legal assemblage. Only when terrorism is invoked do the debates, deliberations and considerations take on an all India perspective. For example tying together of two conceptual lines, national security and human rights, in the court through the invocation of terrorism creates a space. Judges and commentators use this space for the re-invocation of a number of stories. Encompassing critique and praise, these stories cement and reaffirm the relation between citizen and state, security and law as well as between concrete incidents and terrorism. This terrorism tells an incomplete tale. Because ultimately it is not a tale in and of itself, but rather terrorism emerges out of a host of assemblages tying concrete bodies to terrorism and stabilising them as terrorist. The court works in an assemblage of tensions between conceptual lines sometimes giving rise to re-iterations of various tales about the state as guarantor of liberties, freedom and security and the citizen and sometimes giving rise to entirely new combinations. Occasionally the assemblage of terrorism and court works to make a singular entity out of the state, an entity that makes an attack on a few, an attack on the whole. To be Indian means to be attacked by terrorism, to be attacked by terrorism means to be Indian. However, assemblage thinking goes beyond thinking about identity and representation in fixed terms and ultimately, citizen and state, are only one facet of an ever-working arrangement.⁶⁵

2.6.2 The Final Tools of the TCA

One of the difficulties in using the TCA to better understand how the terrorist comes into existence is that it requires the diligent following of traces. Every aspect of method and theory becomes interlinked and important. There are natural limitations arising out of such work. The purpose of this entire chapter is to lay out the theoretical toolkit necessary to follow the actors and to make sense of their interactions

⁶⁵ Relations between state, power and identity in respect of South Asia are discussed by Muppidi in (Barkawi and Laffey 2001).

while striking the balance between translation and betrayal discussed in 2.2.3. In order to do this I need to complete the toolkit.

2.6.2.1 The Role of Work in the Assemblage

Ian Buchanan interprets assemblages as *working* arrangements (Buchanan 2015). Work, effort and the actions of actants function as the glue that stabilises tense relations in the assemblage. By this I mean the quite concrete work that goes into transporting for example a file from one courtroom to the next, or to look up a case of precedence that is then brought into the assemblage. But work in the assemblage is also the telling of plausible stories, the rearranging of traces and the production of artefacts to support one particular narrative of reality. This could for example be the work undertaken by the forensics teams and their analysis to translate traces of gunpowder residue into texts that are admitted into evidence.

2.6.2.2 Tense Relations and their Stabilisation

In the assemblage relations amongst actants are tense. They are both constantly performed and thus instable as well as pushing and pulling on all other actants. Translations, coding and territorialisation all play a role in how the circulation that lies at the heart of the assemblage plays out from one moment to the next. When the tensions between actants are subdued and made invisible, I speak of stabilisation. When the stabilisation takes the form of a connection between a body of texts and an otherwise insignificant incident I am referring to it as a *vinculum*. For example in the process of analysing the above mentioned gunpowder residue the forensic team may have disagreements about the interpretation of impurities. Once a decision has been made either way a report is produced which is very unlikely to reflect the tensions. The tense relations have been stabilised. Or rather, since this is not fixed mass but a circulation, they are transitorily stable.

2.6.2.3 Choreography and the Skilled Navigation

In the example above and in the TCA some actants work towards stabilisation. It could be the head of the forensic unit who has an

interest in producing a transportable outcome (the report that can be passed on to court). Or in the case of the TCA it could be the judge who has an interest in arriving at a judgment. In the case of the TCA the Judge plays a crucial role in facilitating the choreography of the security assemblage and legal assemblage coming together (Shankar 2009). Skilled navigation between territorialising assemblages is necessary. Otherwise the court risks becoming bogged down in the legal intricacies of terrorism, whereas the members of the security assemblage engage in extra legal operations. The idea of the judge as skilled navigator draws on the skilful legal navigator. Building on the concept by Ballard the skilled cultural navigator focuses is able to skilfully manage the tension of two differing cultural influences in their everyday life (Ballard and Banks 1994). This concept is then expanded, chiefly by Menski, to the context of individuals navigating differing legal expectations on their behaviour (Menski 2006; Shah 2007; Shah and Foblets 2016). This concept is very useful in understanding the way the judge balances and navigates the intricacies of the tension between the legal and the security assemblages.

2.6.3 The TCA and the Link to India

Treating the court in a terrorism trial as an assemblage combines material components and expressive components. Additionally there are parameters along coded/decoded and territorialised/deterritorialised axes. The interactions of the parts of the terror court assemblage give rise to emergent properties. Perhaps the most visible emergent property of the TCA is its virtual capacity to pass judgment. Therefore the judgment becomes a key player in both case studies (chapters 6 and 7). The properties and capacities of the judgment in the well known case relating to the 2008 Mumbai attacks provide an example that is the focus of this section.

Considering the judgment of the Session Court in relation to the Mumbai Attacks of 2008, its properties are quickly listed. It is a document of 1588 pages of text, printed in double spaced lines and black ink. The page format is that of legal paper which makes each

page 216 x 356mm in size. Each page contains the page number, case file (S.C.No. 175/09) and date (Judgment dt. 6.5.2010) in the header. That the version used for quick reference in this research is a PDF document raises a number of other assemblages to relevance. It is quite possible that there are some additional properties of the judgment, which are not listed here, however as a rule the properties are both actual and enumerable. These properties play an important role in tying the judgment into the pre-existing legal assemblage and in making it work as part of the passage of law as described by Latour.

The capacities of the judgment form a potentially infinite number of virtual (real but not yet actual) capacities, which emerge only in interaction with something that can be affected. In Deleuzian terms the judgment has affects (capacities to affect and be affected). These affects are innumerable as they are dependent in their actualisation on encountering another component with corresponding affects. Another way of putting this is that all capacities of the judgment are relational. The sentencing part of the judgment illustrates this well. On Page 1578 of the judgment it is written: “5) The accused No. 1 is further convicted of the offence punishable u/s 302 r/w of Indian Penal Code and u/s 302 r/w 109 and 120B of Indian Penal Code and is sentenced to death and is further sentenced to pay a fine of Rs.10,000/- (Rs. Ten thousand only) i/d to suffer S.I. For one month. He shall be hanged by neck till he is dead.”⁶⁶ This part of the judgment has the virtual capacity to effect the killing of the accused No.1. Clearly this is relational in respect of Accused No.1. as it requires from him to contribute his capacity to be killed in order for the virtual capacity of the judgment to become emergent. A number of further parts are clearly required so that virtual capacity of the judgment to kill can become actual. In this sense the affective properties of the judgment are also relational to the executioner. The executioner is called upon to manipulate the properties of wood, rope, gravity, to create a machine with the virtual capacity to kill and

⁶⁶See Kasab Sessions Court Judgement.

then to feed the accused's body into the machine causing a disruption in the interaction of the organs of the condemned body. This makes both the judgment's and the machine's virtual capacity to kill an actual capacity. One more layer of complexity is that the two sentences extracted from the judgment (in their interaction with the whole) also have the capacity to interact with a number of other assemblages. In this interaction disrupting, or deactivating, components of other assemblages that normally operate in society to prevent the disruption of one human body's function by another (killing). Neither of the above observed emergent capacities is however unique to the TCA.

The above illustration of the properties and capacities of the judgment and the relevance of assemblage thinking to the judgment as a part of the TCA consists of a relatively straightforward scenario. Yet, it is more complex and more insightful to look at the Judgment as a component of the TCA in the process of narrating a story. This approach is contrary to "The traditional legal strategy of story-beginning [that] looks to when 'the trouble' began, and fans out in the direction of legally relevant facts" (Scheppelle 1988, 2094). In the Kasab Case the court begins its account with a brief history of the official Indian version of how Jammu and Kashmir became a part of independent India. The wide-angle view, which is according to Scheppelle is often used by judges to grant more sway to outsider accounts, is in this case used to tie in the account of the events into wider struggle, with a clear and historic we-they separation (Scheppelle 1988). This shows how the judge navigates the territorialising pulls of the legal assemblage and the security assemblage. Territorialisation is evident in physical terms in delineating and defining the borders between India and Pakistan. But also in a non-spacial territorialisation where segments of expressivity relating to Jammu and Kashmir and the border dispute there enter into the TCA. If therefore the components in their interaction which make the TCA a court have as emergent properties that the virtual

judgment has both legality and legitimacy then these emergent properties extend to the actual judgment as well.

2.7 The Judgment Between Expressive And Material Components

The judgment in the Kasab case further contains very long and rich descriptions of the radicalisation of some of the accused. The judgment is set up in such a way that it makes the terrorists speak their own histories. There are also many parts of the testimony that the judge deems unnecessary to the furtherance of the case. These parts are subsequently left out, even if their traces are not. The first parts of the judgment tell a story which is mainly based on the confession of the primary accused. This is followed by an extensive appraisal of the witnesses; almost 800 pages of witness statements are taken and discussed from a total of 654 witnesses. This is followed by an in depth discussion of the applicable procedural and substantive law. An international dimension is evident in the beginning and the end of the judgment. Moreover, the recording of evidence and the discussion of its admissibility are focused on regular legal process and procedure. As discussed above the judgment of the TCA incorporates both material and expressive components. Additionally, it interacts with and is in constantly changing relations with a number of other assemblages of which it is a component. In turn these assemblages contribute to the performance of the contingent capacities of the judgment to be legal and transportable. Two parts of the Kasab judgment illustrate particularly poignantly that there are fluid, sometimes expected and sometimes unexpected constellations arising from the tensions between the TCA components.

2.7.1 Here, There, And The International

The first component of the TCA that comes to the fore in the judgment illustrates the decomposability of the TCA as well as how it is territorialised. The judge ties a wider international discourse into the narrative of the judgment, choreographing the tension between security and legal assemblage. Yet even as they interact with and

become part of the TCA components from both these assemblages retain their independent identity. Two quotes from the Kasab judgment illustrate this choreographing:

“The organization [LeT], it may be noted, is banned in India under Unlawful Activities (Prevention) Act, 1967. It is also banned in Pakistan, United Kingdom and many other Countries. The wanted accused No. 1 - Hafeez Mohammad Saeed @ Hafiz @ Hafiz Saab has been listed as Major of Lashkar-e-Taiba. The United Nations Security Council has also listed the wanted accused No.2- Zaki-Ur-Rehaman Lakhvi as one of the senior members of Lashkar-e-Taiba.”⁶⁷

And:

“It is the case of prosecution that the wanted accused No. 2- Zaki-Ur-Rehaman Lakhvi is listed as terror group’s chief for anti india [sic] operations. The prosecution has also alleged that the new outfit named as Jammatt-Ud-Dawa has

⁶⁷ Kasab Sessions Court Judgment p.10.

also been recently declared as
terrorist front by United Nations as
per its Resolution No. 1267.”⁶⁸

Both quotes show how the judge ties material and expressive components from both the legal and security assemblages into the TCA. More importantly it illustrates how the choreography maintains their interactions and fluidity. The body of a person, or rather the body of the ‘wanted’ accused No. 1, is virtual in the sense that there might be an actual body that is wanted but is not present there. Material components also include the paper on which the Security Council resolution and UAPA are printed as well as the implicit material components standing in the background. The expressive components interact, merge and create tensions in manifold, innumerable and complex ways with each other and with the material components. One example of this is visible from the two quotes above. They create a tension between the absent bodies of Hafiz Mohammed Saeed and Zaki-Ur-Rehman Lakhvi as subject to the legal assemblage on one side. Both are then also tied into an international security assemblage of counter terrorism resolutions on the other. In this kaleidoscopically arranged world relations are dichotomous and militarised. States, India, UK, USA and more ambivalently Pakistan, are pitted against a shadowy, militarised and organised enemy.⁶⁹ This dichotomy is reinforced by the invocation of the rule of law, through the indication that these organisations are banned through legal instruments, sanctioned and supported by the UN. The working assemblage behind the Kasab judgment powerfully works in the opposite direction to the warnings made by Charles Tilly that:

“A remarkable array of actors
sometimes adopt terror as a

⁶⁸ Kasab Sessions Court Judgment p.11.

⁶⁹ For a discussion of international Indian security relations see (Budania 2003; A. Gupta 2008).

strategy, and therefore no coherent set of cause effect propositions can explain terrorism as a whole. [...] Most terror occurs on the perpetrators' own home territory, and nonspecialist – zealots – inflict a significant share of the terror that does occur outside of home territory. The fact does not diminish the horror of September 11. But it does warn against analysing terror as if it consisted of closer or more distant approximations to that terrible series of attacks on the United States. [...] Terrorism is not a single causally coherent phenomenon” (Tilly 2004, 11).

Other parts of the judgment clearly display a different stance on Pakistan, painting a world of states governed by rule of law, coming together in international organisations, besieged by a militaristic and organised enemy. The absence of Hafiz Mohammed Saeed's⁷⁰ body in the courtroom only adds to the power of this narrative, as all his properties are as virtual as his body, while his alleged capacities are grimly present in the courtroom. This reduces the room for empathy through shared properties, such as a body, and increases the space of the expressive. It further also opens the space for the TCA to speak

⁷⁰ Alleged mastermind behind the Mumbai Attacks and leader of Jama'at-Ud-Da'wah as well as Lashkar-e-Taiba.

authoritatively on behalf of the terrorist and ultimately to seemingly make them speak.

The TCA territorialises in the following way: on the one hand, the body of Hafiz Mohammed Saeed is subsumed making him more terrorist and less human. On the other hand, the boundary between the states and the terrorists is strengthened and the delineation is imbued with the moral weight of terrorism. As a consequence the states are grouped together as a territorialised entity in opposition to the outside. The TCA with its component international discourse becomes more territorialised.

2.7.2 The Bhelwala Who United India

A second component of the TCA is concerned with the portrayal of various people in the judgment. This is exemplary to understand the value of assemblage thinking for this thesis. The portrayals and non-portrayals of tensions between groups are integrated in a wider narrative. That narrative is intermeshed with the deterritorialisation of one aspect of the attack, the attackers chose targets that would mainly affect the wealth, to reinforce another, the attackers were terrorists the victims Indian. In other words, the tension in terrorist-citizen relations transcends the tension in rich-poor relations.⁷¹

The targets of the terrorist attacks on Mumbai were presumably chosen for their symbolic importance. The fact that this coincided with a high number of victims who were financially well to do as well as internationally connected, perhaps contributed to the massive global media attention that the unfolding events received. The imagery of the events underlined the clear (economic) territorialisation of the five star hotels as their own assemblages. Both the Oberoi and the Taj hotels that were targeted have clearly defined mechanisms to make them inaccessible to the majority of Mumbai residents. The economic territorialisation, which is a component of the attacks, clashes in the judgment with the attention that is given to the story of one person introduced as Gupta Bhelwala. While Gupta

⁷¹ For a very complex economic history of India see (Rudolph 1987).

Bhelwala does not make a bodily appearance in the courtroom he plays a significant role in the case. Gupta Bhelwala is introduced into the case with the cryptic sentence: “One Gupta bhel vendor was selling bhel near the [rear] gate [of the Cama Hospital].”⁷² This account, provided by another witness (P.W. 103), is taken in stride by the court who makes Gupta (a common last name often used by entire communities) the first and Bhelwala (Person selling Bhel) the last name of that person. According to the witness account, Gupta Bhelwala is shot. However, all the traces we would expect in a legal assemblage are not there. There is neither a record of him being processed at a hospital nor was his body identified on site. He is not brought into court, leaving P.W. 103 to speak for him. None of this in itself is necessarily remarkable in the context of a TCA. However, Gupta Bhelwala appears again in the sentencing stage when Justice M. L. Tahaliyani exhorts the extreme brutality of the terrorists with the sentence: “The accused has not spared even the poor Bhelwala who had not even come in his way at Badruddin Tayyabi Road.”⁷³ (The rear gate of Cama Hospital leads onto BT Road) The Judge then goes on to conclude that in light of such brutality “the chances of accused being reformed or rehabilitated are nil”⁷⁴ and to impose a veritable series of death sentences. The nameless Bhelwala who was shot by the terrorists becomes part of the reasoning of the judge to impose the harshest penalty possible. In the TCA, India’s poor, invisible to the point of not having a name or a body which can be produced before the courts, have nevertheless left their traces on the judgment, obviously cementing the territorialisation of the whole of India against the terrorist other. The portrayal of the terrorist as preying on rich and poor alike without a chance at reform, rehabilitation or redemption is instrumental in the deterritorialisation of the TCA along economic lines and the simultaneous reterritorialisation along Indian/terrorist lines. The Bhelwala is ideally positioned for this role in the TCA because of his imaginary power.

⁷² p. 370 Kasab Sessions Court Judgment.

⁷³ p. 1570 Kasab Sessions Court Judgment.

⁷⁴ p. 1570 Kasab Sessions Court Judgment.

This power can bring to life images to the vast majority of Indians from their own streets and experiences. It is an image that has the capacity to conjure a plurality of tastes in a delicious ensemble and peaceful strolling along a market. That the virtual embodiment of this image was shot by the terrorist drives terrorism home. This injection into the familiar and domestic creates a direct tension between the individual and the terrorist.

2.8 Chapter Conclusion

This chapter has established a conceptual and terminological horizon for this thesis and translated ANT and assemblage thinking into the TCA. As such, it is aimed at offering a novel path to explore how the terrorist is made. I have touched upon role of the skilful navigators in choreographing the tensions between the pre-existing legal assemblage and the pre-existing security assemblage. The choreography of tensions in the TCA, while easily negligible individually all contribute to terrorism being performed in a more or less stable manner. Perhaps most importantly for the following section assemblage thinking not only permits but also requires the inclusion of theoretical accounts of terrorism and their effects on the assemblage. So far the section has translated Terrorism/Counter-terrorism in Indian Law into the same ontological universe as assemblage, while devising a toolkit and vocabulary to explore the case studies. Such a translation is challenging and bountiful. It is challenging as it questions accepted epistemologies in many ways and thus moves into uncertain territory. It is bountiful because it sidesteps the dichotomies that inhibit exploration. To explore micro stabilisations in the assemblage allows us to explore and question the grand picture, which all too often is bogged down by chasms between agency and structure, law and security, terrorists and citizens, fact and value. In this novel and uncertain territory, new intensities emerge and become visible, challenging and rewarding the inquiry. In the process of thinking about the role of laws and courts to counter-terrorism in India, assemblage thinking can tentatively bring to light how how vincula within the TCA stabilise, perform and articulate terrorist facts. Making the terrorist speak and act in wider social relations. More unorthodoxly the section then turned to Gupta Bhelwala in the TCA and tensions between virtuality and actuality in relation to terrorism and poverty that force us to consider that Latour's vincula may operate as shortcuts as well as detours and create their little bonds between unexpected actants. This illustrates the power of assemblage thinking as it permits to approach various

components of an assemblage without a hierarchy of importance thus making visible aspects, tensions and facets which would generally be dismissed.

The next chapter focuses on how the TCA does not silence one mainstream critique of terrorism laws at the expense of the other but rather highlights their productive tension. We are thus capable of perceiving the critiques as components of the assemblage engaging in relations of de-territorialisation creating emergent spaces from their affects. In line with assemblage thinking this approach doesn't provide a grand answer to an essential question but rather destabilises dichotomous assumptions about the nature of terrorism and law. In doing so we can see the roles that theories as well as legal and academic inquiries and practices play in stabilising performances and thus making actants appear less precarious. This makes inroads into explaining why contrary to the above-mentioned adage, most places most of the time One Man's terrorist is also Another Man's terrorist.

Chapter 3 – Facets of the Assemblage

3.1 Chapter Introduction: The Role of Theory in the Assemblage

Within the TCA relations between components are theorised together with practices, constitutive of social relations (Bourdieu 1977). This chapter explores critical debates, theoretical models and theory inspired tools that are used to make sense of counter terrorism laws and their courts. Their inclusion is essential for the case studies and interviews, as the tensions between these theory components and practices are integral to the TCA. Different theorisations of terrorism and law are expressive components in the assemblage. Different explanatory avenues to explain the intersection between law and terrorism are actants in their own right. The theories leave traces in the assemblage and give rise to tense relationships with other components. The first two sense making endeavours on this intersection are formulated from a position that reflects the tension in the TCA between the legal assemblage and the security assemblage. I therefore call them the liberal critique and the security critique. Actors who take part in the everyday working of the TCA formulate these two critiques. The second set of theories plays a slightly less direct role but also informs the everyday workings of the TCA, but because of their high level of abstraction I have termed them macro-theories.

The implicit claim of these theories is that their relation to the other components of the assemblage is one of explanation and description. However, the theories about terrorism and law stand in a more complex relationship with practices of terrorism and law. Within the assemblage theories give rise to and inform a whole array of practices. They also make sense of/in specific facets of the assemblage. Within the assemblage each theoretical approach offers a partial view. These specific theoretical tools are useful because they highlight one facet⁷⁵

⁷⁵ By facet I mean a sub assemblage within the assemblage. In other words a circulation between

but this usefulness is limited because it also leaves some components of the TCA unexplored.

Theories also actively cast shadows. This is one of the reasons why assemblages are such an enriching way to think about terrorism laws, since they allow putting other explanatory frameworks into context by following actants who enter into relations with other actants, without forcing theoretical purity. Each theory has an important role to play while it remains crucial to recognise the explanatory pull these theories exert and to recognise that the assemblage continues even in the blind spots of these theories. It is not always possible to recognise and appropriately contextualise observations and interview questions. Nor is it possible to do so with patterns of thought that are often implicitly informed by theoretical frameworks. Another advantage of the TCA is that it only requires me to engage with theories as far as they play a role in the assemblage. In other words only as far as they leave traces and thus become actants.

This chapter proceeds in two sections. The first section focuses on the central and polarised debate between security and law. At first sight, the TCA is often seemingly suspended between these two poles. However it soon becomes clear that this debate is only one facet of the TCA. Albeit one that easily moves itself to centre stage as actors are making sense of their own position within the TCA and between the territorialising tensions of the pre-existing security assemblage and the pre-existing legal assemblage. The second section turns to macro theorisations of the intersection of terrorism and law. The TCA includes a layer of commentators who theorise the operation of some of its facets and feed back into its practices. The sense making endeavours of intellectuals, academics and activists play a role in the TCA. The discussion of macro theories as actants demonstrates how their insights are usefully applied within the TCA. Interviewed actors have referred to these theories occasionally to make some facet of the TCA understandable to me. Following those

actants which is more or less territorialized but also plays a role in the wider assemblage.

actors and the traces that they leave behind permits the analysis to understand both the two critiques and the four macro-theories as actants in the TCA. This inclusion of explanatory frameworks is not contrary to assemblage methods as it is encountered through the traces left behind rather than as invisible macro explanatory frameworks.

The TCA offers the possibility of showing how all above mentioned theory facets stand in tension with each other. As is often the case in writing inspired by Deleuze and Guattari, the sections stand in a rhizomatic relation to each other. While they are presented in a sequence this should not be considered a straightjacket. A better metaphor would be that of the kaleidoscope, in which mixing up the order and the tension between cutting edge blocks, can produce a new and mesmerizing picture. The role of this chapter is to highlight the unique usefulness of the TCA in making visible the tensions between seemingly separate ways the intersection between terrorism and law. The way that macro theories are shown to play a role in the assemblage is not an exhaustive account of these theories. The focus on how they work as facets of the TCA makes it impossible to do them justice as theories in their own right. The eclectic selection of components is informed by the specific traces encountered during this research and therefore only offers a rudimentary snapshot of tensions relevant to the arrangement of this inquiry.

3.2 Working Courts between Security and Law and Order Critique

Starting from the common point of departure, that the status quo is not ideal, both critiques address similar problems in different directions. For the law and order critique, terrorism is first and foremost a law and order problem that needs to be addressed as such. For the security critique terrorism is first and foremost a security problem and that shapes the view the proponents of this critique take on desirable developments to the status quo.

3.2.1 The Law and Order Critique in The TCA

Laws play an important role in the TCA. They are actants that code and territorialise relations in the assemblage. Indian laws against terrorism have been analysed, criticised and defended from a number of vantage points. One set of substantial critiques is summed up here as the law and order critique. Under the heading of this critique a number of concerns are voiced, ranging from processes and procedures, to the rule of law and rights. Critiques from these angles abound, focusing on both “law’s words [and] law’s deeds and effects” (U. K. Singh 2007, 15). The breadth of these critiques combines a large number of theoretical strategies and applied methodologies. Some embrace analysis of legal texts while others combine empirical research and case studies in their approaches. (Srivastav 2005; U. K. Singh 2007). Contributions come from a wide variety of backgrounds including academic journals, think tank analysis, commission reports and a wide array of journalistic or personally motivated contributions. As with so many topics that grip the public imagination, everybody has an opinion on terrorism and by extension many feel strongly about how it is dealt with in law. At the heart of the law and order critique of counter terrorism and its working through the courts and through the laws in India lie three very simple *a priori* contentions. First “[T]errorism is a threat to democracy” (Srivastav 2005, ix). This core contention lies at the heart of the extreme urgency with which terrorism is dealt with by many democracies. Secondly “Anti-terrorist laws are a way of combating terrorism” (Srivastav 2005, ix). As part

of being law and order oriented democracies the fight against terrorism needs to be undertaken within the framework of law. And third “If conceived unwisely and applied irrationally, such laws can damage democracy more than terrorism” (Srivastav 2005, ix). This assessment is informed by the core values of democracies, such as freedom of expression or free and fair trials which have been curtailed for the sake of combating terrorism (Wilkinson 1986). A curtailing which runs the risk of coring the very concept meant to be protected. This section proceeds by paying close attention to each of the three contentions in turn.

3.2.1.1 Terrorism Is A Threat To Democracy

Most people implicitly accept the assumption that terrorism is a threat to democracy. It is indeed so often repeated as a mantra of politicians of all stripes and colours that it is very difficult not to accept it at face value. As Singh puts it, “[a]ll anti-terror laws brought into the statute books after 9/11, have lofty claims, drawing from the so-called ‘international consensus’ over the Bush doctrine of ‘spreading democracy’, assuring ‘enduring freedom’ and liberty, and ‘making the world safe for democracy’.” Both the security critique and the law and order critique perceive of terrorism as a threat to democracy. This link with democracy implicitly underlines the particularly condemnable nature of terrorism as a threat not only to individuals but to the political system.⁷⁶ It is important to note that in this framing of the issue it is not the ‘state’ in terms of its policies and institutions that is under attack, but rather a unified entity of people and state which is attacked for their very identity and values. This portrayal of the situation is endorsed in the US “by an alignment of liberal political commentators, philosophers and historians who celebrate American interventionism as the only antidote to terror” (U. K. Singh 2007, 23). This leads to a situation where according to some commentators “[t]he ‘emergency suspensions of rights’, and the ‘admissibility’ of torture ‘in cases of necessity’ were the prerogative of

⁷⁶ A very important contribution confounding this separation is (Baxi 2009, 169 & 170).

liberal democratic governments, even if it trampled upon the rights of citizens” (U. K. Singh 2007, 24). The critique of these developments by proponents of the law and order critique are twofold. On one hand they are sceptical of what they see as the “delineation of the moral community constitutive of the ‘us’ has figured in debates of anti-terror laws worldwide” (U. K. Singh 2007, 24). In which “[s]ignificantly, ‘liberty’ and ‘security’ occur as the binary nodes that fashion the alignment of forces and arguments in the debate” (U. K. Singh 2007, 24). This line of critique is principled and aimed at the risks of framing the debates surrounding terrorism and law as a zero sum game between security and liberty. The second strand of this critique decries that the most vulnerable are disproportionately affected by the implementation of drastic security measures against terrorism. In this critique a line is drawn between “those who belong to the moral community - the depository of freedom and security - from those whose rights to be free and secure may be dispensed with” (U. K. Singh 2007, 24). Therefore outsiders and foreign nationals are the primarily target of such endeavours during which the security of all citizens is weighed against that of a voiceless and alien minority (Cole 2003). In addition there is the potential for far reaching consequences when the state can easily “label people as terrorists, or their sympathisers, placing them ‘outside the moral community’ as non-citizens, ‘to whom human rights have no relevance’” (U. K. Singh 2007, 24).

The proponents of the law and order critique accuse their opponents of conflating terrorists with their means to affect their moral and legal identity as outsiders and non-holders of human rights. The conflict between citizen on one hand and terrorist on the other risks becoming a Manichean struggle for survival. This conflation of ends, means and person, may on the one hand generate the public will necessary to implement stringent counter measures and therefore be a very necessary part of protecting a society from acts of terror. On the other hand, it also runs the risk of curtailing the available options, by limiting those that are thinkable and plausible. The assumption,

shared between both the security critique and the liberal critique, that terrorists are the enemies of democracy, may very well be accurate in any number of cases. Yet to accept it as an unquestioned assumption poses an unacceptable risk through the consequences it has for both the conception of policy and law to protect society. This risk is further exacerbated for cases at the fringe of a positional and vague definition of terrorism. This operation of terrorism laws to further disenfranchise the already vulnerable calls attention back to the crucial but embattled role that definitions of terrorism play for proponents of a law and order response to terrorism.⁷⁷

3.2.1.2 Anti-Terrorism Laws Are A Way Of Combating Terrorism

The first step for something to enter the legal domain is to be rephrased in legal terms. Therefore most accounts of anti-terrorism laws in India begin with a few words on the definition of terrorism (A. Goswami 2002). Some suggest considering terrorism as the peacetime equivalent of a war crime (Scharf 2004; A. Schmid 2004). Others point to the flurry of legislative activity following 9/11 which includes United Nations Security Council Resolution 1373, the UK Anti-Terrorism, Crime and Security Act, 2001.⁷⁸ Perhaps most prominently these definitions point to the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, 2001 (USA PATRIOT Act 2001) which is complemented by President Bush's Military Order paving the way for the trial of Non-Citizens in the War Against Terrorism (Bravin 2014). The USA PATRIOT Act, 2001 in Sec 802 amends Section 2331 of Title 18, United States Code to redefine domestic terrorism as activities that:

⁷⁷ For a discussion of the relationship between law and order and counter terrorism, see various contributions from the symposium on the matter published in the *Cardozo Law Review* 27(5) March 2006, and on definitions in particular (Begorre-Bret 2006) in the same volume.

⁷⁸ For a nuanced assessment of the impact of this see for example (Goede 2008).

“(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;

“(B) appear to be intended -

“(i) to intimidate or coerce a civilian population;

“(ii) to influence the policy of a government by intimidation or coercion;

The USA PATRIOT Act, 2001 with its definition of terrorism in many ways set the tone for similar acts or the addition of amendments around the globe that followed in its wake. In the case of the United States, the definition in Sec 802 does not create new crimes *per se*, but rather fundamentally loosens the restrictions placed on government in the process of investigating, building a case and making that case before the court (ACLU Undated). This has effects on the ability of accused to defend themselves against allegations brought by the government. Many of these restrictions are in place so that in an adversarial system the individual is not at a disadvantage in comparison to the wealth or resources at the disposal of public prosecutors.

In India the response to 9/11 included the promulgation of the Prevention of Terrorism Ordinance (POTO) on 24 October 2001 by the government of India. The government largely based the provisions on a previously rejected counter-terrorism law, drafted by the Indian Law Commission. This was passed into law by parliament in an exceptional joint sitting of both houses of parliament on the 28th of March 2002. Chapter II, Section III, (1) states that:

(1) Whoever,—

(a) with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community or causes damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the Government

of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act;

(b) is or continues to be a member of an association declared unlawful under the Unlawful Activities (Prevention) Act, 1967 (37 of 1967), or voluntarily does an act aiding or promoting in any manner the objects of such association and in either case is in possession of any unlicensed firearms, ammunition, explosive or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property, commits a terrorist act.

Explanation.—For the purposes of this sub-section, "a terrorist act" shall include the act of raising funds

intended for the purpose of terrorism.

In addition to the wide-angle terrorism definition contained in part (a), this act also makes membership, fundraising and support of or for an unlawful organisation tantamount to terrorism (b). However, there seems to be an objection to considering violent acts terrorism if they have been committed for the sole purpose of monetary gain, introducing a yet another distinction between crime and terrorism.⁷⁹ While POTA is no longer in force, cases begun under it carry on in the courts despite the definitional controversy. These two definitions are illustrative of the way in which laws are understood to facilitate and enable the combating of terrorism.

3.2.1.3 Such Laws Can Also Be A Threat To Democracy

The third proposition of the liberal critique is that overly draconian laws endanger democracy. On the one hand the laws passed by parliament run contrary to best human rights practice and rule of law (in the case of India, contrary to the constitutional promises). (Bakshi 2013) On the other hand, the danger originates from the practical implementation of these laws by the security organs and by the courts.

The above definitions of terrorism demonstrate that the potential for abuse is inherent in far sweeping definitions. The possibility of abuse is amplified by the prospect of banning entire organisations and making their entire supporters terrorist. The impact that this could have on both democratic politics and the protection of the civil and political rights of the members of the targeted organisations could be substantial. It follows logically that the scope of these laws is understood by many critics from the law and order point of view to be endangering a number of liberal values.⁸⁰ Ranging from free

⁷⁹ An example from the literature that draws this separation into question is (Flanigan 2012).

⁸⁰ A very active voice of these critiques is the Peoples Union for Civil Liberties (PUCL) who have a wide

speech and freedom of association, to limiting the possibility of guilt by association and circumvention of due process. Besides giving the state great leeway in pursuing perceived terrorists, this also has the potential of impacting negatively both on the electoral process and wider perceptions of human rights and rule of law. There are a number of instances in India where counter terrorism laws were used against political opponents (Banks and Baker 2015). Terrorism and the TCA show affects with everyday politics. In other words the TCA and everyday political events are susceptible to being influential upon each other.

The second potential threat to democracy from terror laws lies in their implementation. The roles that state agencies play in implementing these laws are notoriously secretive and often decried for malignancy. Whether it is the case of the Terrorist and Disruptive Activities Prevention Act (TADA) frequently used against relatively harmless individuals who ran foul of the local police and magistracy (Amnesty International 1994). There are many reports that abuse in POTA detentions or the notorious Armed Forces Special Powers Act (AFSPA) in force in Kashmir and the North East is facilitated by draconian laws (Human Rights Watch 1991). Further enabling deviance from due process and cloaking increased abuse by the security organs in their shadow (Mukherji 2012).

Therefore, while the liberal critique casts terrorism first and foremost as a law and order problem, to be tackled by law and order means, it laments two developments. On the one hand, the draconian nature of the laws often led to stigmatisation of communities and organisations on a political whim. On the other hand, meddling with the procedural safeguards, included in regular criminal process to ensure the fairness of the trial for the accused, leads to increased abuse by the state (Mohapatra 2004). The perceived threat of terrorism to democracy is shorthand for a whole host of liberal values, which are supposedly threatened by the existence of terrorism. However the liberal critique

is also weary of specialised laws to counter this threat as they may give rise to a threat of their own. Degrading the trust in law and order, in the efficacy of human rights for protecting individuals from the state, and in the benevolent nature of the security organs can have severe and far-reaching consequences for the liberal project.

3.2.2 The Role of the Law and Order Critique in the TCA

The liberal critique is a component of the TCA. It interacts with the other components of the TCA, exerting and receiving tension. The tensions arising out of the liberal critique and its relations with the other components of the assemblage have an impact on the territorialisation of the assemblage. The critique brings to the fore a relationship between terrorism, liberal democracy and law. This creates linkages between what is going on in the specific courtroom and conjures far-reaching (virtual) repercussions. Consequently, these linkages increase the pressure and the tensions within the assemblage. These tensions bring into the assemblage thoughts and considerations that are linked expressively to claims of causality and ultimately have a bearing on the emergent properties of the TCA.

The liberal critique and its three propositions have a territorialising effect within the TCA. The focus is on definitions and ways of understanding the relationship between terrorism, law and a wider political enterprise.⁸¹ Its result is to make certain arrangements implicit and invisible even uncontested, reducing the transformative range of the TCA relations. However, in the TCA the affects of the liberal critique and those of the security critique also have deterritorialising properties. Casting the assemblage as one of *terrorism - liberal democracy - law* draws up a set of borders of what can be considered a part of the assemblage, which are not the same borders the security critique would draw. Solidifying the delineation of the aspects and components playing a role in the assemblage and attempting to change the hierarchy of the components breaks up the

⁸¹ For example see various contributions in the edited volume (Slater and Stohl 1988).

territorialised and coded assemblage of the court in the pre-existing legal assemblage and is part and parcel of the TCA.

3.2.3 The Security Critique in the TCA

3.2.3.1 Security And Laws Against Terrorism

The critique of the current state of laws in India from a position of national security is more elusive in academic circles than the ubiquitous liberal critiques. Nevertheless, if the circle is expanded to include not only members of the academy, traditionally defined, but also those members of the Indian public who feel compelled and qualified to comment upon terrorism and its laws, then a different picture presents itself. These include think tanks, the media and perhaps most importantly those who do not only comment but practice security, draft and implement policy. A prime example of such a practitioner turned commentator is K.P.S. Gill. The former Director General of Police (DGP) is credited with having “rebuilt a shattered and infiltrated Punjab Police and [...having] led that force to defeat terrorism in Punjab and thereby saved Punjab for the country” (Shourie 2001). In a number of speeches, presentations, books and journals Gill is not only a vehement proponent of encompassing and tough counter terrorism policies but also a ‘super cop’ for the most hawkish of security critics (Dawn News 2002). In contrast to the liberal critique, the security critique does not attempt to achieve a pure theoretical position before transferring it to practice, but rather argues from a practice and experience oriented point of ‘common sense’. Ultimately however, it mirrors the liberal critique in its two-stage structure. Counter-terrorism laws are critiqued both for their content and for the politics of their implementation or repeal (Ginsburg and Moustafa 2008, 47–54). As such proponents of the security critique decry the laws as political and unable to address terrorism as an international phenomenon. What is worse is that these laws are perceived to fetter counter-terrorism and arguably even protect terrorists (Rabasa et al. 2009; Cherian Undated; Mathew 2009).

3.2.3.2 Laws Are a Play Thing of the Political

In his vehement defence of TADA, the draconian counter terrorism law in force in the eighties and early nineties, Shourie exhibits the security-oriented fervour that has gained momentum globally during the GWOT. His arguments, repeated in many forms by a host of other commentators pivots on portraying the fight against terrorism as a life and death struggle for the Indian state. In his opinion the lapsing of TADA resulted in “an instrument vital in the country’s life and death struggle against the terrorist invasion [to be] thrown aside” (Shourie 2001, 246). Not only does he go on extolling the virtue of an unbridled hand for security personnel engaging in the war against terrorism and its international backers. He further argues forcefully that terrorism is unlike crime and as such goes beyond the purview of the Criminal Procedure Code and the Indian Penal Code, and even beyond the jurisdiction of the courts. While TADA is extolled as “the one law that drove some fear into those who had been harbouring terrorists,” he bitterly criticises the government for allowing it to lapse for purely populist reasons (Shourie 2001, 240). In the context of TADA, Shourie’s account goes on to dismiss its misuse against Muslims, insinuating that TADA was kept on the books when it served the congress government of 1990-92 Gujarat to target members of the “Bhartya Kisan Union, the RSS-affiliated organisation of agriculturalists [...during which] there was little protest against TADA” (Shourie 2001, 241). This critique aimed both at those repealing TADA, its implementation and subsequent laws contend that the provision of security should be above politics, and that any politicisation of the security apparatus, including its laws, (a phenomenon which is pervasive in India according to this account) is detrimental to security. The effect of the security critique on the TCA is a different territorialisation of the TCA than the law and order critique above.

3.2.3.3 Counter-Terrorism Is Fettered by Laws

Shourie insinuates that the public outrage at abuses of TADA was only due to “TADA [coming] to touch the networks of those who

wield the real influence in our country today, those who manipulate their puppets from Dubai and elsewhere” (Shourie 2001, 242). In this interpretation, claims about abuse against Muslims are a part of an organised subterfuge to allow (Muslim) terrorists to continue their campaign against the Indian state. The underlying message of the security critics is that the legal process in India is irreversibly mired in political battles and the back and forth of populist individuals. Therefore, matters of life and death are best left to professionals. Those professionals are according to this account found in the police and security services, and should in the best interest of the survival of the nation be allowed to do their work with all the political and legal backing possible. For the security critics, understanding terrorism as an international phenomenon puts it outside of the jurisdiction of domestic laws into the realm of the anarchy⁸² between states (Buros 2011; Petallides 2012). Fettering counter terrorism policies with legal restraints not only puts counter terrorists at a disadvantage vis-à-vis the terrorists but it also puts the state at a disadvantage in comparison to its un-scrupled international rivals, mainly Pakistan but to an extent also the gulf countries. Again TADA is upheld to provide an example of a law that did not hamper the security organs as severely as subsequent laws. The warlike portrayal of counter-terrorism, drawing on Kissingerian realism, props up the argument that counter-terrorism efforts have to be undertaken unfettered by legal restrictions such as human rights, due process and civil liberties.⁸³ In this way, the extreme brutality of the security organs is justified with the brutality of the terrorist violence and ultimately the sovereign interest of the state. The portrayal of the conflict as a matter of life and death makes the extrajudicial action of the police patriotic and any resistance on procedural grounds nothing less than treasonous.

⁸² Discussions of anarchy between states are peripheral for this work, but see (Bull, Hurrell, and Hoffman 2012) for a full discussion.

⁸³ This type of interpretation lies at the heart of the policies of the George W. Bush administration in the United States and gave rise to the Global War on Terror this interpretation is questioned and discussed in (Kowalski 2008).

Some may perceive Shourie's account as hyperbolic or non-representative. However the common theme cannot be ignored and is reflected in the work of many think tanks and commentators as well as echoed by the media.⁸⁴

One way of conceptualising terrorism/counter-terrorism is through the lens of a totalitarian conflict pitting 'soldiers' and 'troops' fighting for the good of the nation against opponents who

“define their identity in terms of
negating and destroying India, a
country in which the most powerful
organisations - ISI, fundamentalist
groups such as the Lashkar-e-Toiba
- exist only to destroy India,
organisations for which the Jihad
against India is the fount of power,
of lucre” (Shourie 2001, 288).

This critique's powerful rhetoric and simplistic appeal to commonly held fears has made it very influential. This influence stretches back long before the American rhetoric of the GWOT lent it powerful backing and a transnational dimension.⁸⁵

One could be forgiven for thinking that the TCA is suspended between the polar opposites of the popular and powerful security critique and the liberal critique. However, after discussing some additional aspects of the security critique this chapter will return to demonstrating how these are only the most visible twin peaks of a much larger assemblage.

⁸⁴ For a good example of this echoing effect see the terrorism section of Fox News <http://www.foxnews.com/category/world/terrorism.html>.

⁸⁵ For a great discussion of ISI and their role in the region see (Kiessling 2011).

II.3.d Terrorists Are Protected By Laws

Both the security critique and the law and order critique have a territorializing effect on the TCA. Critiquing the other side goes hand in hand with the process of securing for themselves the position to bring their expertise of choice to bear. From the vantage point of the security critique, the laws and the courts are inapt at providing security, because they lack the single-mindedness of purpose necessary for combating the scourge of terrorism. The courts are accused by the security minded observers of being “a judiciary that looks upon each issue by itself” (Shourie 2001, 246). The implicit accusation is that the strictly case-oriented application of the law leads to the upholding of procedural safeguards protecting the accused, even when the country is engaged in a life and death against the accused. It can be deduced that the authors of these arguments would prefer courts that would be swayed by the very precariousness of ‘survival’, to not mince words over the civil rights of accused. The situation is described as follows:

“Those who carried out the blasts in
Bombay are still on trial - nine years
after those terrible explosions. Far
from the cases reaching a
conclusion in the trial court, all sorts
of appeals on technical points have
been entertained and now lie in the
laps of higher courts. Is such a
sequence not an invitation to
terrorism?” (Shourie 2001, 291).

This observation and particularly the conclusion that this is an invitation to terrorism is a core argument for a tougher stance on terrorism be it as part of the law or outside of it. Wherever one

stands on the causality suggested by such an interpretation, it is clear that what is being called for is a more efficient judiciary, more professionalism, and ultimately a higher degree of sophistication of the entire machinery aimed at fighting terror.

3.2.4 Both Critiques In The Assemblage

Both the security and law and order critiques share the assumption that the resolution of this conflict, or perhaps victory in this conflict, will come about through increased sophistication of the deployed tools. On the one hand, these tools may be technological: improved surveillance equipment, better bulletproof vests, increased capacities at sifting the Internet's meta-data. On the other hand, these tools may be legal: inclusion of new forensic methods into standards of evidence, a better definition of terrorism, a fast track for warrants and longer interrogation and pre-trial detention periods. Higher quality police work and increased judicial resources. Even when disagreeing about the exact content of these changes proponents of both critiques seem to agree that increased professionalization and expertise building in the process of counter-terrorism is required. They also share a drive towards a greater sophistication in professional capacities and the increased reliance on experts in relation to terrorism. This plays a key part in the delineation of terrorism/counterterrorism as a field of both practice and study. A field the content of which is embattled just as the contours are reinforced. In other words, this is a process of territorialisation at work. This territorialisation is evident in the law and order critique as well as in the security critique.

However, understanding both critiques as expressive components and actants of the TCA shows how the tensions between them territorialize and delineate the acceptable boundaries of the TCA. These same tensions also create spaces in which de-territorializing components can take root. This simultaneous stabilization of terrorism/counter-terrorism as a delineated field, encompassing study and practice, and the destabilisation of the relations within these lines, results in unpredictability in the TCA. If we understand a court as a

highly territorialized and coded assemblage under normal definitional circumstances then the impact of terrorism on this defined, ordered and delineated assemblage is to rend it into an assemblage in flux. The law and order critique and the security critique give voice to where actants draw the boundaries of the assemblage and how they see their role in changing the circulations that make up the TCA.

3.3 Assemblages And Other Macro-Theories

Within any assemblage an indeterminate number of theories play a role. Theories at various levels of abstraction qualify, participate and impact the assemblage. In the case of the TCA “Middle Range Theories”, such as the two approaches above, qualify tensions between components (Bryman 2012, 18). Their effect is to draw a territorializing line through the virtual capacities of interactions, and thus limiting the likelihood of actualization. At any given moment one interaction within the assemblage could be drawn in one or the other direction by the tensions exerted by those critiques. This section now turns to the role that “Grand Theories” play in the TCA.⁸⁶ The assemblage extends from the very concrete to the (absurdly) abstract. In addition to facilitating mind-games, the possibility of including multiple layers of abstraction within the assemblage is one of its advantages. In practical terms, this mixed blessing makes it possible to explore facets of the TCA as they are explained by other theories. While keeping in mind that all components of the TCA are rhizomatic and imminently in tension with each other, let us, for a moment, pretend that there are two spheres in the assemblage. The inner sphere consists of components that interact directly, whereas the outer sphere consists of components that exert influences onto the inner components by virtue of sense making and meaning-production. Grand theories are territorialisations in the outer sphere. Suspending the pretence of two separate spheres, it becomes clear that they too are intensively engaged in interactions with all other components of the TCA.

Following Tania Murray Li’s methodology of allowing a number of theories to inspire the questions and the methodology, four theories stand out (T. M. Li 2007). The four areas that have inspired this work, through the questions they are asking, the mechanisms they are unearthing and the language they are using, are fully-fledged social

⁸⁶ The distinction between middle range theories and grand theories is drawn from (Bryman 2012) who in turn synthesizes a long tradition of debate on the role of theory in research.

theories in their own right, and as such, can only be engaged with as far as they are relevant to the assemblage. The unique advantage of assemblage thinking is to be able to incorporate these theories into its fold, with the ensuing limitations being due to the restricted scope of this work and its focus on the specific TCA. This section is structured in four sub-sections. In turn these subsections touch upon Systems Theory and its view of law, Critical Legal Thought and its impact on the idea of adjudication, concepts of Exception and Emergency, and finally conceptualizations of Governance and Power. Each of these theories raises and answers very important questions about the interactions of security laws with the legal system. This legal system is what I refer to as the pre-existing legal assemblage. Systems Theory is helpful in outlining the legal system as a defined, coded and delineated within the state. The pre-existing legal assemblage, has as its core the ability and perhaps the purpose to work as a force for oppressive control and the maintenance of power relations. Critical Legal thought allows us to identify some of the aspects of this mechanism and some of the mechanisms of control through the legal system. However, the legal assemblage is not homogenous enough to warrant a full condemnation of it as merely a tool of the ruling classes. It has to be understood in a wider context as something which develops a precarious dynamic through the continuous interactions between its components and serves as a disciplining element of governance on all who interact with it. Finally, in order to serve effectively the legal assemblage stands in tense relations with exercises of sovereignty which may disrupt its ability to function as a means of governance and social control, in order to maintain hegemony there needs to be a dividing line between the normal process and exceptions. This is where the theories of emergency and exception come in. It is between the norm and the exception that the governance function of the legal system is made possible. The contrast between the two, in its entire artifice, is what allows the law to play a part in governing and disciplining but also constituting functions that go far beyond that of the mere repression.

The sovereign power is dissimulated, diffused and made the exception in a system that is based on the non-existent norm. Each of the following subparts deals with their respective theory block in its own right, while at the same time attempting to limit the discussion to those areas of the theory which are relevant to the current project.

The theories are employed here, not as theoretical edifices of their own, but rather as components of the TCA. As such of course justice cannot be done to the full theoretical discussion, and the theories become facets of a wider machine. While a great amount of effort is made to link section to section, a tension between these theories is going to remain due to their different backgrounds and purposes. Rather than to provide a final answer to any questions about the relationship between the legal assemblage and security assemblage, the purpose of this section is to unearth spaces and make visible productive tensions between the grand theories as they interact. Moreover, it is demonstrated how these spaces and tensions territorialize other components within the TCA.

3.3.1 Social Systems Theory And The TCA

According to the Social Systems Theory proposed by Niklas Luhmann, Law is one among many Social Systems (Luhmann 1995). Systems Theory has a high degree of theoretical sophistication and complexity. The key to understanding Law as a Social System is the concept of the *autopoietic* system, which is a system that “produces and reproduces its own elements by the interaction of its elements” (Teubner 2011, 3). Such a system is “characterized by a circular, recursive, self-referential mode of operation” (Luhmann 1988, 136). It is therefore through the circular construction of meaning within the system that the system is not only able to reproduce itself, but to also operate while at the same time being essentially closed, operationally, to the outside. Law as a social system “is a subsystem of society, and that there are other subsystems as well” (Luhmann 1988, 136). In systems theory law is understood as a social system that is a part of a wider social system. “To conceive of society as itself

a differentiated social system presupposes a general theory of social systems that can deal not only with the comprehensive system of society as a whole but also with other social systems, such as face-to-face interaction, or organizations” (Luhmann 1988, 136).

An important caveat for Social Systems Theory is that we should avoid presupposing law as something existing outside of society. It follows that “[t]he legal system is a differentiated functional system *within* society. Thus in its own operations, the legal system is continually engaged in carrying out the self-reproduction (autopoiesis) of the overall social system as well as its own” (Luhmann 1988, 138). The suggestion that the reproduction of the legal system at the same time constitutes a part of the reproduction of the overall social system brings our attention to two important conclusions. On the one hand, that a threat to the social system also is a threat to the legal system. On the other hand, that the way in which meaning is constituted within the legal system has some bearing on the social system and vice versa. If a threat to the social system also constitutes a threat to the legal system, it should not be surprising for the legal system to react harshly when society as a whole is perceived to be at risk as explored in 3.2.1.1 In other words, all operations of the legal system have to be partially directed at the reproduction of the overall system itself. On goings that relate to the security of the social system as a whole, of which the legal system is a sub-system, then become markedly different from operations which are related to the management of routine events within the system. More explicitly, if crime is both an operational and constitutive category of the legal system, the existence of the category of crime is essential to the maintenance and reproduction of the system. Unlike crime, terrorism is not constitutive of the legal system, even if it might be operational. The category of terrorism cannot be reconciled with the legal system internally, rather it is a category that exists across a number of social systems. The latter point highlights that

“the legal system fulfils a function

for society - that it ‘serves’ society -

but also that the legal system participates in society's construction of reality, so that in the law, as everywhere in society, the ordinary meanings of words (of names, numbers, designations for objects and actions, etc.) can, and must, be presupposed" (Luhmann 1988, 138).

The legal systems operations are therefore fundamentally linked to the constitution of meaning within society. This holds true not only in the legal context but also in setting the scope for the use of categories like terrorist. Consequently, the role of the system of law in determining categories of both a legal dimension and of a wider social import is paramount.

"[Y]et, as a closed system, the law is completely autonomous at the level of its own operations. Only the law can say what is lawful and what is unlawful, and in deciding this question it must always refer to the results of its own operations and to the consequences for the system's future operations. In each of its own operations it has to reproduce its own operational capacity. It achieves its structural stability

through this recursively and not, as
one might suppose, through
favourable input or worthy output”
(Luhmann 1988, 139).

Despite its strengths, there is a long line of very poignant criticisms of Luhmann’s theory; limitations that are avoided by positioning the legal system as part of the TCA. Positing the system as reproducing communications is misleading as it is actants more broadly who enact the communications and thus reproduce them. This is an important difference and one that limits the ways in which systems theory can participate in assemblage theory. However positing the pre-existing legal assemblage as a closed, self-maintaining system adds to its territorialisation, identity and clear delineation.

The second important aspect for the TCA is the claim made by system theorists that there is responsive simplification inside the legal system compared to the outside (Luhmann 1988, 8). This reduction of complexity has to do with a process of digestion, akin to translation, which takes place between the system and its outside. In other words, there is an element of interaction between the outside of the system and the inside of the system. This interaction is not transfer, but rather one of an impetus traveling from the outside and being translated within the categories of the system. This is relevant to the legal system because events/phenomena occur and are translated into the language/communications of the system before gaining effect. In addition to adding to the territorialisation of the pre-existing legal assemblage systems theory also offers an alternative perspective on translation. Understanding translation as digestion allows elements from the outside to be brought into the system without challenging its borders. This process of digestion reduces complexity, in the sense that it reconstitutes an infinite multitude of phenomena into clear-cut rubrics of the system. While this is only one facet of how translation works as part of assemblage it is nevertheless an important one. Systems theory highlights that there is

something special going on and that there are sets of translations taking place at the borders of a delineated legal assemblage that share commonalities.

Yet, the consequences of such a translation remain questionable. Accepting that there are commonalities to the translations taking place along territorialized *legal system* borders, what are the consequences for the tensions that run across this border in the TCA? Even if Law as a Social System in Luhmann's sense is equivalent to the pre-existing legal assemblage, the borders of that legal system are fluid, negotiated and precarious vis a vis other facets of the assemblage. For the TCA it is difficult to accept the binary Luhmann suggests between Legal and Illegal as the two operative criteria of the legal system as a totality (Luhmann 2004, 118). To do so would significantly constrain the qualities of tensions between components within the territory of the legal system and defeat parts of the purpose of working with assemblage. The assemblage allows us to remain attuned to the role of actors as components in the assemblage; components that are subject to tensions that only then produce legal or illegal categories.

Despite these differences, Luhmann's system theory contributes to this thesis. Firstly Systems Theory contributes to the understanding of territorialisations of the pre-existing legal assemblage in the TCA. Secondly understanding certain types of translations as digestion from outside to inside contributes to our understanding of the quality of the relations between actants embedded in different territorialisations. Finally the TCA resonates with the idea of the constitution of meaning within the self-referential, autopoietic legal system, which displays sets of hierarchical tensions, running along coded blueprints. In the next section I turn to Critical Legal Studies as deterritorialising the pre-existing legal assemblage by bringing politics into it.

3.3.2 Critical Legal Studies And The TCA

Critical legal theory takes its starting point in “represent[ing] adjudication and legislation as parts of political and cultural life” (D.

Kennedy 1997, 1). Despite being novel at conception, this view is not a very unsettling premise in today's understandings of law. Nevertheless, it allows us to question "the role of political ideology [...] in the part of judicial activity that is best described as law making" (D. Kennedy 1997, 1). Law making includes both parliamentary activity and judicial interpretation.

"[L]aw-making activity of judges takes place in the context of a structure of legal rules, in the face of particular gap, conflict, or ambiguity in the structure. Judges resolve interpretive questions through a form of work that consists in restating some part of this structure and then deploying a repertoire of legal arguments to justify their solutions. The most important mode of influence of ideology in adjudication comes from the interpenetration of this specific, technical rhetoric of legal justification and the general political rhetoric of the time" (D. Kennedy 1997, 1).

Beyond what is suggested above, we can point to the role of tensions between the technical discourse and the practices observed, between the rhetoric of the legal and the rhetoric of the social. We can take this mechanism, and see how it functions, not with one specific

ideology, but with ideologies in general to maintain two separate sense-making frameworks, one of law and one of the polity. Further, it is key to note the way in which these ideologies maintain these frameworks as separate through the device of the technical language of law.

Hence, CLS becomes tremendously helpful in understanding the position and role of the judge, something we were not able to discern in Systems Theory, because of the absence of individual agency. Contrastingly, in CLS, as the agent of adjudication, the judge is at the heart of some amount of “anxiety” for observers of the legal system (D. Kennedy 1997, 30). Not only anxiety, but

“[a]s soon as we shift from understanding adjudication as rule application to understanding it as interpretation, we threaten to destabilise the larger Liberal conceptual structure that distinguishes courts from legislatures, law from politics, technical from democratic decision making, and the rule of law from tyranny” (D. Kennedy 1997, 37).

While this certainly is something to keep in mind the importance of Kennedy’s statement for our purposes is to question the apparent resilience of the distinction between rule of law and tyranny. In other words, this thesis identifies some of the mechanisms in the operation of Indian Counter Terrorism Laws, which insulate the rule of law from tyranny. These mechanisms have to be highly effective on a number of different levels and in a number of different dimensions, if they are to uphold this separation. The need for this effectiveness is

present even in light of the history of counter terrorism practices over past decades and recent years. (Carr 2008) In other words, in light of the legislative history, the implementation of laws, and the realities of the courtrooms, it contributes to the aim of this thesis to demonstrate some of the factors that allow people to continue to regard the law as the rule of law.

Clearly there is a multitude of factors at work. But the focus in this section is on the ability of technical and procedural discourse to provide both the semblance of coherence and a-political-ness. In other words, this section highlights the role of technocratic discourses of procedure in managing tensions between due process statements and practical deviations. Of course this links the discussion here to the question regarding the uniformity of the legal system. In the terminology of this enquiry, it reinforces the position that understands the legal system as a stratified assemblage in which different territorialisations result in diverging sets of tensions. It is in this sense that we define the CLS position on the rule of law as requiring:

“That there be justiciable legal restraints on what one private party can do to another, and on what executive officers can do to private parties;

That judges understand themselves to be enjoined to enforce these restraints independently of the views of the executive and the legislature, and of political parties;

That judges understand themselves to be bound by a norm of

interpretive fidelity to the body of
legal materials that are relevant to
whatever dispute is before them”
(D. Kennedy 1997, 13).

This conception of the rule of law shows the arbitrary separation of facets of our TCA. Nevertheless gaps remain regarding what happens in an area where the legal restraints are very limited. For example in procedure and in process, what happens when judges, independent as they may be, come to the same conclusion as the legislature, executive and political parties. Particularly when this is at the expense of a minority, and when the norm of interpretive fidelity becomes interpreted in an effects oriented way. It is in this context that Kennedy comes to the conclusion that the value of the rule of law

“depends on a context of other
modern Western Liberal
institutions, so it doesn’t make sense
to prescribe it for another kind of
society without knowing a lot about
it. It sometimes has to be
compromised with ideas like
emergency, national security, or just
‘substantial justice’” (D. Kennedy
1997, 14).

Ultimately Kennedy identifies two phenomena that are key for our assemblage. On the one hand,

“the degree to which the settled
rules (whether contained in a Code
or in common law) structure public

and private life so as to empower some groups at the expense of others, and in general function to reproduce the systems of hierarchy that characterize the society in question” (D. Kennedy 1997, 14).

The connections Kennedy is drawing between the code at the heart of the pre-existing legal assemblage and wider social and political tensions have a deterritorialising effect. Rather than to adhere to a secluded domain of the legal system he shows tensions existing between these and other actants. Furthermore he goes on to show the role of individual actors in performing these hierarchies and delineations.

“[T]he degree to which the system of legal rules contains gaps, conflicts, and ambiguities that get resolved by judges pursuing conscious, half-conscious, or unconscious ideological projects with respect to these issues of hierarchy” (D. Kennedy 1997, 14).

For the current project we have to take these two points from the critique of adjudication provided by Kennedy. On the one hand, the relevance of individual actors in the process of making law and on the other hand, and perhaps more importantly, that these actors are under a number of known and unknown influences that lead them to come to certain conclusions when presented with certain circumstances.

However within assemblage thinking we cannot allow these influences to float around as invisible explanatory frameworks. What we can trace is that a large part of legal rhetoric is aimed at the neutrality, impartiality and independence from politics, territorializing the border between law and politics. What Kennedy has traced for us is that the act of adjudication is embedded in a context that makes it possible but also limits the scope of its directionality. The very nature of using discretion not only to apply but also to interpret a norm, requires a political mind and presupposes a certain contextualization of the current event into a wider political and social context. It is therefore a myth, albeit a useful one, that the legal system and adjudication are separated from politics, or any other part of the assemblage. Ultimately however, the distinction is highly important in order to maintain and keep in balance the great edifice of political liberalism, which requires the idea of separation of powers in order to clothe naked power. The caveat that we have seen above, regarding the potential necessity of curtailing this understanding of the rule of law for reasons of national security, is at the heart of the next theoretical point we will look into. The dangerous balance between the rule of law and tyranny lies at the heart of a long intellectual debate surrounding theories of emergency and exception with the potential to territorialize certain facets of the TCA.⁸⁷

3.3.3 Exception And Emergency In The TCA

The most prominent theoreticians of the state of exception are probably Carl Schmitt and more recently Giorgio Agamben (Schmitt 2010; Agamben 2005). Most aspects of the recent surge of interest in states of exceptions have been somehow linked and prompted by the Global War on Terror and its legal regime. Terrorism, or more broadly speaking security laws are inherently linked to questions of the relationship between sovereignty and the rule of law. The often cited maxim of *necessitas legem non habet* is at the heart of the tensions

⁸⁷ An example of a juxtaposition of terrorist movements and liberalism can be found in (Berman 2004).

surrounding terrorism in law and “its position at the limit between politics and law” (Agamben 2005, 1). Many attempts of legal scholarship to address some of the questions of exception are on the one hand marred by

“the paradoxical position of [exceptional laws] being juridical measures that cannot be understood in legal terms, and the state of exception appears as the legal form of what cannot have legal form. On the other hand, if the law employs the exception - that is the suspension of law itself - as its original means of referring to and encompassing life, then a theory of the state of exception is the preliminary condition for any definition of the relation that binds and, at the same time, abandons the living being to law” (Agamben 2005, 1).

Agamben’s theory of emergency puts its finger on questions of territory in the TCA that are important for this thesis. These questions tie back to judicial independence in the sense of judges acting independently from executive influence as encountered in CLS. But they also very fundamentally call into question any notion regarding the rule of law as something that exists insulated from politics. If we have drawn insights about the pre-existing legal

assemblage from Luhmann and insights about adjudication from Kennedy, Agamben's contributions are more directly relevant to the TCA. The continued importance of the pre-existing legal assemblage in the TCA links to the idea that the exercise of power through the legal system is somehow imbued with a greater degree of legitimacy than that of pure, raw, political force.⁸⁸ This is due to the fact that, according to the classical model of liberal democracy, the source, the interpretation and the enforcement of the rule are all separated institutionally to generate this legitimacy. Agamben continually points to the high degree of tension between implicit norms and benchmarks of operation and the state of exception. In his words this is due to the

“state of exception and [...] its close relationship to civil war, insurrection, and resistance. Because civil war is the opposite of normal conditions, it lies in a zone of undecidability with respect to the state of exception, which is state power's immediate response to the most extreme internal conflicts”
(Agamben 2005, 2).

These logics, can be, and are of course also applied to the question of terrorism. In this context, perhaps Agamben's perspective is slightly different. Taking an international perspective he argues that

“[f]aced with the unstoppable progression of what has been called a ‘global civil war,’ the state of

⁸⁸ For a critical appraisal of this position see (Schmitt 2004).

exception tends increasingly to appear as the dominant paradigm of government in contemporary politics. This transformation of a provisional and exceptional measure into a technique of government threatens radically to alter - in fact, has already palpably altered - the structure and meaning of the transitional distinction between constitutional forms. Indeed, from this perspective, the state of exception appears as a threshold of indeterminacy between democracy and absolutism” (Agamben 2005, 3).

The important question for our work is about routine states of exception, the everyday bracketing of small segments of the legal system supported by the rationale of necessity. The operation of the TCA which diverges practically from the pre-existing legal assemblage to satisfy the necessities of the security assemblage. These everyday effects qualify tensions in the assemblage and interact with the other components in ways that have a de-territorializing/re-territorialising effect. This tension plays out between legal and security facets of the TCA, the latter creating necessities and the former responding with exceptions. Many of the same rationales apply here, but this banality of exception is something, which in today’s world is far more dangerous and likely to affect whole populations than the apocalyptic cessation of the rule of law on a grand scale (Taylor 2009).

Necessitas legem non habet gains a new meaning in light of 3.3. We can apply it both to the macro scale of the whole legal system, and to the micro scale of the individual judge applying their mind to the discretion at their disposal, particularly in procedure. The judge then acts as the skilled navigator choreographing facets of the TCA between norm and exception. The traces of emergency and exception are then firstly, the role and scope of the individual judge; secondly, the role of the process and procedure in insulating the wider legal system from these processes; and thirdly, the role of other components, for example other legal actors, in facilitating or enabling this hybrid state of rule of law/exception rippling through the entire assemblage.

The main question that Agamben is concerned with is that of the specific paradox of the state of exception. In the practices of the TCA there are tensions and contradictions but there is no insurmountable paradox. As actants continuously keep interacting and overcome or bypass contradictions. This coexistence of theoretical incoherence in the TCA is something that resonates with Agamben building on Benjamin and Schmitt, to reach the conclusion that the state of exception is situated at the threshold

“where inside and outside do not
exclude each other but rather blur
with each other. The suspension of
the norm does not mean its
abolition, and the zone of anomie
that it establishes is not (or at least
claims not to be) unrelated to the
juridical order” (Agamben 2005,
23).

This passage is key for the understanding of this section. On the one hand, we observe the norm of the legal order. On the other hand,

this norm is suspended in its application. The key is that the suspension of the said norm does not amount to its abolition. In other words, while in specific counter-terrorism trials various procedural norms are suspended at the discretion of actors and reflect specific alignments of tensions, these norms continue to exist as the visible benchmarks giving rise to and reflecting another set of tensions. This is the very essence of a Hegelian dialectic moment where the exception, necessity and emergency of these particular trials cause the negation of norms. In the Hegelian sense, negation stems from the German *Aufhebung*, which includes the idea of an uplifting of the norm, the idea of its conservation/preservation and the idea of its cancellation. Therefore, in practice the negation of the everyday norms of procedure causes them, not to cease to exist, but to take on the function of 'the other' for the process in which they are suspended.

It is important at this step to return to the everyday character of these hybrid, banal and mundane states of exception we are concerned with here. The tensions between the ordinary and the extraordinary, or the routine versus the exception, creates productive tensions within the TCA. This negation of the norms of procedure, and the consequent tension between process and procedure, takes place on a micro level. It is in a case-by-case scenario rather than on some overarching planned level with sinister Machiavellian characters pulling the strings behind the scenes. It takes place in an uncoordinated and spontaneous fashion throughout the assemblage. Only as a result of the operations of the assemblage are these then tied into a wider idea of terrorism. Foucauldian ideas of governance and discipline are explored in more depth in the next sub-section. These ideas capture a part of the tension inherent between the components of the assemblage, while also turning our eye to the governance effects of specific territorialisations. Ultimately the link that has to be explored in the next section is one of power. It is in this context that Agamben still plays a role, particularly with respect to the theorization of sovereign power. The next section links theories of power to those of

governance, between the role of the emergency/exception and the every day of the legal system.

3.3.4 Sovereignty, Power and Governance In The TCA

3.3.4.1 Sovereignty and Governance

The question of power over the body lies very close to the heart of a TCA; one can only point to the interrogation and detention practices used on suspected terrorists or the executions of those found guilty to grasp this connection. This power over the body can in some ways be understood as sovereign power.⁸⁹ It boils down to two separate acts of power that have been understood as the essence of sovereignty by Slomp (Slomp 2009). The power to decide on the exception is what makes up the essence of sovereignty for Schmitt (Schmitt 2010). It is thus a sovereign act to decide which subject will be exposed to the unbridled power of the state, and which one will be granted all the protections that are considered inherently part of a modern (liberal) legal system. This act of sovereignty does not necessarily take place at the centre of the state; it may be very much a diffuse decision taken place at the level of the judge or the magistrate. It may not even be a decision in the classical sense of the word, but rather something that organically and necessarily grows out of the process that has been put in motion by a number of minor decisions (Tagma 2009). It may also be a central sovereign decision in the more classical sense, as in the case of designating an area as disturbed, lifting the rule of law, or refusing a mercy petition. These conditions of exception with regard to the body leave traces. Traces on the body and traces on objects are then often translated and we have access to reports on abuses in detention and the execution of terrorists. We sometimes even have pictures of their dead bodies (Ramakrishnan 2013). These traces play a crucial role in researching and observing the different components of the TCA. Particularly as they stand in tension with the legal traces that leave a very different trail.

⁸⁹ For a discussion of this parallel see the excerpt from *The History of Sexuality* in (Michel Foucault and Rabinow 1991, 258–78).

The second essential act of power associated with sovereignty is about the ultimate power to kill. The sovereign power to kill manifests itself in two forms. First the power to kill emerges out of the pre-existing legal assemblage in the form of a death sentence. The President of India has to sign off on any mercy petition/death warrant. In addition every death warrant has to be reviewed by the High Court that has jurisdiction. The second form of the state's power to kill is more diffuse and manifests itself without coded form through extrajudicial killings. These are also exercises of sovereign power, albeit on an almost individual level by small agents of the state. This diffuse as well as central manifestation is similar to the power to decide the exception. While Foucault was very clear on recognizing that power is something which comes into existence in a diffuse manner and not only at the centre of the state but rather as the domination over people which gives rise to the state (M. Foucault 2007, 239).

In contrast in the Schmittian view, it is the sovereign who decides on the imposition of the exception, and a diffusion of this deciding role would undermine sovereignty itself (Slomp 2009, 50). In other words, the ultimate act of sovereignty according to Schmitt is to rule out the rule of law. This is something we can see in the courts on an everyday basis. Where the individual judge, decides to overrule, drop under the table, or disregard certain legal norms sovereignty (in the smaller scale of the court) is being undermined in the name of exceptions. While this could be attributed to the discretion inherent in the application of mind as a key prerogative of the judge, it seems to be also indicative of a certain hybrid state of exception territorializing parts of the pre-existing legal assemblage. While the observations undertaken in this study follow actors and the traces they leave in specific contained cases, it is possible that these moments of exception are more widespread in the legal assemblage as a whole. In other words, while this study focuses on the TCA this is something that might not be unique to the TCA. However, the general rule of law is not collapsing; rather discourses of procedural norms allow this

multitude of banal exceptions to be negotiated and discussed without threatening the continued existence of the image of the norm that lies at their heart.

Recognizing the abovementioned essential acts of power is crucial for understanding how the Indian legal system sustains its legitimacy and preserves (the semblance of) due process and norm adherence. The key here is to understand the role of moments of exception in governance. Arguably there are two aspects of governance here, namely a governance of the judicial and a governance of the exception.

On the one hand there are governance effects at work onto the judicial agents - judges, magistrates, clerks, prosecutors, investigators. Shaping their view of the exceptionality of certain crimes, particularly those designated as terrorism, and at the same time contributing to a constitution of terrorism as a particular category of crime. This category shares meaning and includes certain manifestations of political violence while excluding others. This pervasive form of power is a form of governance and is deeply connected with ideas of identity, ideas of threat, fear and ultimately the shared conception of the state versus that which is designated as a Schmittian political enemy (Schmitt, Strong, and Strauss 2007). For Schmitt this enemy cannot be allowed to survive.

On the other hand, stands a governance of the exception. In other words this is the management of these moments of exception into something coherent with the norms underlying the wider legal system. The threshold between the judicial order and the exception is also an area that must be managed, in order to keep one from impinging onto the other. Even more explicitly, the functioning of both the moments of exception and the normal rule of law - normal in the sense of norm adherent - must both be able to continue existing, even if they are seemingly mutually exclusionary.

Narratives of procedures are key in the process of managing moments of exception. In the TCA the two territorialisations of the pre-existing legal assemblage and the pre-existing security assemblage

move in tension with each other. The pre-existing legal assemblage is heavily coded and carries with it governing norms and procedures for their application. Whereas the pre-existing security assemblage is geared towards exceptionalism. In the TCA it is then the choreography of the two, which in successful cases forms a tense balance whereas the TCA fails in unsuccessful cases. On a macro theoretical level, they are only a mechanism within a wider dynamic.

3.3.4.2 Conceptualizations of Power in the TCA

On a micro level these mechanics revolve around stabilization and power. The TCA requires a nuanced perception of power as a diffuse circulation, however there are other perceptions of power, which may play a role.

Firstly, the three dimensional understanding of power was coined by Steven Lukes. It aims to expand on a model of power, which includes only a one dimension of getting one's way in decision-making and the second dimension of blocking decision-making. His contribution points us to the way in which preferences in decision making are formed, the lacunae between what seems to be an interest and a real interest and the power of agenda setting (Lukes 2005). The second relevant model of power is by Robert A. Dahl who argues that power exists on a continuum, from mild forms of influence to harsh forms of coercion (Dahl 1989). Finally, there is a third view of power, which we cannot bypass. Foucault sets out to explore "power in terms of the set of mechanism and procedures that have the role or function and theme, even when they are unsuccessful, of securing power" (M. Foucault 2007, 2). This understanding of power as a circulation through a set of mechanisms and procedures is what lies at the heart of the TCA.

In Dahl and Lukes view power is something wieldier. While both theorists focused predominantly on the political process, there is a very interesting side line to be drawn from Lukes' analysis for the legal process. In terms of agenda setting in politics, one party may be able to exercise power by shaping the debate. So, through setting the agenda one can influence what the starting positions of both sides are

and thus streamline and focus the own arguments and force the other side onto the defensive. While Lukes wrote this with political negotiations in mind, it is also a power that is clearly held by the prosecution in criminal trials. In most criminal cases there is a consensus that the case is not 'framed' in the sense of setting an agenda, but rather that the facts and the legal categories speak for themselves and thus necessitate one interpretation. While at the same time in the adversarial system the prosecution makes arguments whereas the defence predominantly takes position on those arguments without being proactive. Clearly in cases where there are a number of applicable laws, as in the case studies of this thesis, a discretionary decision is made. This is done by the investigating organs, together with the prosecution, and the signature of the magistrate. This seems to be a direct parallel to Lukes' idea of agenda setting. The power to set a trial into motion following one particular route of legal debate fundamentally shapes the possible outcomes and the negotiating positions of all involved parties. Additionally, the framing of a certain debate, in this case a certain trial, also has an impact on the contextualization. In other words, there is a connection between the framing of an issue as terrorist, and the pathways open to subsequent development. On the one hand, this reaction may be influencing what the actors perceive as their predominant interest. For example, it could be proposed that if a judge normally has the interest of maintaining the legal system through upholding the rule of law, if an issue is presented as threatening the state, the interest of maintaining the legal system could become expressed in a different way, for example by granting an exception in order to achieve a conviction. This is an issue to which we will return in greater detail in the case studies. But suffice it to say here that the power of framing a charge is akin to what Lukes has described as the power of agenda setting and identified as one aspect of his three-dimensional model of power.

Turning to the third view of power, governance and the power knowledge nexus. Foucault has posited this relationship as part of the

“power, right, truth” triangle (Michel Foucault 1975, 24). The triangle of mutual constitution for Foucault raises a question:

“What are the rules of right that power implements to produce discourses of truth? Or: What type of power is it that is capable of producing discourses of power that have, in a society like ours, such powerful effects?” (Michel Foucault 1975, 24).

This leads us on to the partial and abstract answer he gives to this question:

“Power constantly asks questions and questions us; it constantly investigates and records; it institutionalises the search for the truth, professionalizes it, and rewards it. We have to produce the truth in the same way, really, that we have to produce wealth, and we have to produce the truth in order to be able to produce wealth. In a different sense, we are also subject to the truth in the sense that truth lays down the law: it is the discourse of truth that decides, at least in part;

it conveys and propels truth-effects.

After all, we are judged, condemned, forced to perform tasks, and destined to live and die in certain ways by discourses that are true, and which bring with them specific power-effects. So: rules of right, mechanisms or power, truth-effects. Or: rules of power, and the power of true discourses” (Michel Foucault 1975, 25).

The very linguistic register Foucault uses in this passage, already forces us to consider the legal system as one of the elements of his power discourse. He clearly identifies, both the professionalization, the desire to record and to institutionalize which we have encountered before. And further turns to the very act of adjudication, investigation and passing of sentence as having a truth-effect. In other words, the legal system and more precisely the judicial process are continuously engaged in truth production, as well as in power maintenance and the tying in of what is right.

One of the key points raised by Foucault’s theory is the dis-appearance of the agent. It is “the discourse of truth that decides [...] conveys and propels truth effects” (Michel Foucault 1975, 25). In other words, there is a certain *deus ex machina* in the discourse, which causes it to propagate and propel itself. This resonates with the actor network, which is both a network of distributed actors and a network that acts. So, there is no need for a Schmittian, centralised understanding of the sovereign power that decides on the exception. Rather the discourse of truth, in this case the narratives of law, the state, identity and terrorism, propel themselves and create a certain

dynamic, which leads to a multitude of moments of exception. The agents of the judicial system retain a certain amount of their agency, although of course their behaviour takes place within the truth-effect of the discourse. This means that while a certain amount of discretion is divulged all throughout the system, this discretion is exercised within the wider dynamic, causing it to be much more limited than it appears at face value. Finally, the sovereign moment, at which the individual judge, investigator or prosecutor exercises discretion, is shaped and tied in with the truth and power dynamics of the wider discourse.

Each individual moment of exception, where one rule is broken in coherence with the wider discourse of truth, is tied together with all the other exceptions to form a hybrid state of emergency, where the exception coexists with the norm, while being insulated from it through the right discourse of technocratic, even scientific procedure. It is this demarcation, this existence of the emergency throughout a variety of discourses and narratives, but always at the threshold between process and procedure, between the political and the juridical, which gives rise to a need for management, governance or navigation. There is a necessity, to balance or choreograph the two narratives, in order to ensure that neither impinges on the other too much.

The site of this struggle, in other disciplines is always that of history. Since the legal system is an autopoietic system, it produces its own history. Therefore, it makes sense to look at that in more detail in the case studies. Similar considerations apply to jurisprudence - meaning here, a collection of case law, or the internal history of the law - and many lawyers, and historians of law, see it as a rich source of anecdotal knowledge, with which to underpin the legal argument of the day. Foucault offers an alternative view

“relations of force and the play of
power are the very stuff of history.

History exists, events occur, and

things that happen can and must be remembered, to the extent that relations of power, relations of force, and a certain play of power operate in relations among men. According to Boulainvilliers, historical narratives and political calculations have exactly the same object. Historical narratives and political calculations may not have the same goal, but there is a definite continuity in what they are talking about, and in what is at stake in both narrative and calculation” (Michel Foucault 1975, 168).

In relation to the link between history and jurisprudence, we can begin to understand why there is a need in the judgments to be tied into the wider historical network of precedents. Stabilizations of relations of actants in the TCA are plugged into a wider historical narrative of both terrorism and precedent. Additionally such an understanding of diffuse power and governance adds to the justification of allowing other theories to play a role in the TCA. However, at the same time it is important to keep in mind that this macro-framework is one which is bespoke to the work here. So, rather than providing particular insights by itself, it unfolds its usefulness in respect of the findings from following the actors and their traces. The theoretical framework of this thesis is not meant to provide a full remodelling of the theories of exception and emergency for the world of today. Rather it is meant to provide a starting point

for the articulation of the seemingly confusing and often paradoxical findings from the research into terrorism cases in India.

3.4 Chapter Conclusion: Theories In The TCA

This chapter has illustrated the role that other theories play in the TCA. The collection of two middle range critiques and four broad meta theoretical influences in the TCA has covered a huge amount of theoretical ground traces of which can be found in the assemblage. While justice has not been done to any of the above critiques or meta theories on their own grounds, their role in the assemblage has been showcased. Even when drawing on different conceptual, epistemological and even ontological bases serves the purpose to illustrate the breadth of actants in the TCA. The theories can become one or multiple components in the assemblage, which then exert their own pressures and tensions onto other components. Particularly their territorialising and codifying effects which qualify tensions between other components are interesting as they often remain unseen from within the perspective of the theoretical model. Having showcased how other theories have important contributions to make to, and can be accepted into, the assemblage, the next chapter turns to the role of assemblage thinking for method.

Chapter 4 - The Method Of The Assemblage

4.1 Introduction

This chapter is about my method, the method used to gather my findings and to build up my case studies. As such there is a focus on practical aspects of research method, however since the thesis takes place in a theoretical frame that is reflective and attuned towards the productivity of research, epistemology plays an underlying role. Throughout the chapter there are multiple points of contact with the assemblage, as theory and method are fundamentally intertwined in this approach. Assemblage also informs the limits of my own investigation. Overall the chapter aims to answer key guiding questions for qualitative research including: “How did you go about your research? What overall strategy did you adopt, and why? What design and techniques did you use? Why these and not others?” (Silverman 2009, 334). Drawing on these questions the chapter is structured in six sections. The first section focuses on the two fieldtrips to Delhi. The second section is on the case study approach and choices. The third turns to interviews, their uses and limitations. The fourth section focuses on participant observation. The fifth is about the role of texts and judicial documents in the TCA. And finally the sixth section questions the separation between method and findings and returns the focus to the assemblage.

4.2 Fieldwork

The four circumstances under which fieldwork is the preferable choice of method can be paraphrased as 1) disadvantage of some actors severe enough to limit access to global media; 2) the scholar's aim to disaggregate organisational actors into constituent factions; 3) the scholar's aim to understand internal processes of a group; and 4) the presumption that some actors have an interest in obscuring their preferences and beliefs from public view⁹⁰ (Boix and Stokes 2007). As part of the research for this inquiry I undertook two fieldwork visits to Delhi, India. In my initial thoughts on my inquiry about the relations between terrorism and law, made face-to-face interaction imperative. However, changes took place through iterative processes within and between fieldworks. As highlighted by Marshall and Rossman, "[i]n the early stages of qualitative inquiry, the emphasis is on discovery" (Marshall and Rossman 2014, 79). From the outset, fieldwork was going to play an essential part of my research. But following initial discoveries, the research's focus shifted from the *what* of terrorism to the *how* in Indian Courts. The turn to ANT, assemblages and how the terrorist is produced and stabilised in Indian court emerged because the fieldwork kept turning up elements inexplicable with my initial framework.

Obtaining a research visa to India proved more difficult than anticipated. This delayed the start of the research by almost six months from an initially stipulated start in 2012. The first research visit lasted two months, March and April 2013. The second visit of similar length took place in October and November of the same year. While researchers traveling to India routinely undertake their fieldwork on tourist visas, a practice that is commonly tolerated by the state, there are two specific reasons for undertaking this research entirely above board, and accepting the extensive delays. Firstly, the sensitive nature of planning and conducting interviews on terrorism meant that attention by the state could not be fully ruled out.

⁹⁰ The fourth point is potentially problematic for strict ANT interpretations but will be dealt with in more detail in the case studies.

Secondly, interviews with high-level government employees and members of the judiciary, as well as access to restricted areas such as the Supreme Court and Government Compounds, repeatedly required me to show my visa and having photocopies taken of the relevant pages of my passport.

During both my stays in Delhi, I was affiliated with the Centre For Policy Research who graciously provided a space to do all the planning and calling of people necessary for day-to-day fieldwork. The decision to undertake two separate visits was necessitated by the closing of the Delhi Courts during the summer months. During this period it would have been nearly impossible to conduct effective research due to the monsoon weather, which not only makes travel through the city unpleasant and hazardous, but also leads to many senior officials leaving the city. In addition to being necessary, two periods of fieldwork also allowed for the digestion of the findings in between and thus served a practical purpose as well. During these two visits I undertook my inquiry using a variety of methods, including 43 semi-structured interviews and participant observation in courts and in a law firm. Both the participant observation and the interviews are discussed in their respective sections below.

I approached the initial fieldwork with the intent of hearing from actors and learning from them. The methods seminars I had attended during the first year of my research had given me a number of avenues I wished to explore. I did have a number of theoretical frameworks in mind when approaching the fieldwork. The most important three, systems theory, emergency/exception and governmentality, are dealt with in section 3.3 on other theories in the TCA. It is perhaps important to note here that assemblages and the actor network theory were not part of those initial avenues. The separation between the first and the second fieldwork allowed me to re-assess what worked and what did not. Additionally, the gap allowed me to take advantage of opportunities and contacts made during the first visit to plan the second fieldwork visit in a more structured manner.

By this time it had become clear that none of the initial explanatory frameworks were sufficient in making sense of my findings. At least this would not be possible without declaring some parts of the findings irrelevant or explaining them away. Therefore, I decided to maintain a broad outlook and kept collecting information on what actors are saying they are doing, how they see actants fit together and what relations and tensions I could observe. I was therefore able to collect traces and follow the flow of the TCA in stabilising terrorists even without being aware of the real value of what I collected. This also meant however that in approaching the interview partners I did not directly guide them towards terrorism but rather asked more generally about security laws.⁹¹ This fits well with an assemblage approach where the actors are required to make most of the sense making themselves. Out of the initial batch of interviews and contacts emerged the opportunity for participant observation in the chambers of Ms Nitya Ramakrishnan. Her focus during the time of my second fieldwork was the Special Leave Petition (to move the Supreme Court) in respect of the appeals of two cases, the 1998 Mumbai Commuter Train Bombings and the 2002 Calcutta American Centre Shootings. The collection of information during the fieldwork was therefore done through two distinct, albeit overlapping, methods: the case study and interviews.

4.3 Case Study

A qualitative case study approach is often defined by “its reliance on evidence drawn from a single case and its attempt, at the same time, to illuminate features of a broader set of cases” (Gerring 2006, 29). For the TCA the cases Nasir and Aftab provide two such case studies. As the Nasir TCA (Chapter 6) and the Aftab TCA (Chapter

⁹¹ There are a number of reasons why I am using interview partner instead of more common forms of interviewee or informant. In addition to expressing a higher degree of respect for them as actors (which they undoubtedly continue to be in their interaction with me) it also highlights the relational nature of the interview as something that goes both ways. See for example (Strathern 2006) on this.

7) they provide an easy reference term for the tensions and relations that coalesce around Nasir's and Aftab's becoming terrorists. As such the case studies accompany Nasir and Aftab along some of their journey to becoming terrorist. The focus is on stabilization of relations as discussed in chapter 2 and on legal narration as productive (Pottage 2002). The narrative of the judgments invents Nasir and Aftab as terrorist, but this invention is retroactive and creates the conditions of possibility for the discovery of the terrorist. The two case studies then follow the traces of the actants in the legal narrative of Nasir and Aftab, which lead to their stabilization as terrorist.

Different actants in the Nasir-Terrorist assemblage and the Aftab-Terrorist assemblage would draw the boundaries of relevance very differently. For example, what is relevant to the chemical expert preparing their expert opinion for the court on some "off white colour powder and one bottle containing yellowish colour liquid" recovered from Aftab's house is very different to what is relevant to Ashphaque, Aftab's brother.⁹² Drawing the boundaries of the case study poses a challenge since "the events themselves may be well bounded [...] if one is studying terrorist attacks it may not be clear how the spatial unit of analysis should be understood" (Boix and Stokes 2007, 95). Drawing these boundaries in time is no easier, as many court proceedings in India, especially if they go up the ladder of appeals, take years, often the better part of a decade. And even once the entire legal process has unfolded it still includes the histories touched upon in the judgment and the repercussions of the judgments as precedents.

In order to sidestep these difficulties, I use the fluid boundaries provided by the actors themselves. Different actors draw slightly different boundaries of relevance for the TCA. But nevertheless while these do not overlap fully there is a core and differently defined boundaries around that core. For example, many actors use a court

⁹² For example paragraph 19 of the Sessions Court Judgment in Sessions Case No. 643/98 refers to the seizure and chemical analysis.

case as the scope of analysis without any difficulty, as it has the advantage of coming with its beginning (the terrorist incident) and end (the closure of the case).

If we return to a different case, the example used in Chapter 2, a possible temporal bounding of the Kasab Case could be from the incidents (attacks on Mumbai) in 2008 to the execution of Kasab in 2012. To the legal record this temporal bounding is coherent; there is a clear beginning and ending. But, at closer scrutiny even these common sense beginnings or endings do not remain so clear cut. Does the incident begin with its conception in the terrorists mind? The training of the attackers? Or perhaps the firing of the first shot? The recording of the First Information Report by the police? What if for each of these there are conflicting accounts? Where does it end? With the final Supreme Court Judgment? The prison doctor's declaration of death? The reaction to the death in the Media? Its consequences for Indo-Pakistani relations? Understood in this way the list of possible beginnings or endings is endless, even without touching on the pre-existing legal or pre-existing security assemblages. Therefore, it is important to keep in mind the limitations of understanding the case studies as being circumscribable in either temporal linearity or Cartesian space outside of this text.

These difficulties are largely absent in practice, where practitioners would easily refer to 'the Kasab case' depending on context and political orientation and they might disagree over what is relevant in that case. One actor might draw its beginning all the way to Mughal and Colonial times, another might cite partition, and a third Kasab dropping out of school in 2000.⁹³ Nevertheless the overlap of what different actors refer to as 'the Kasab case' is sufficient to allow for easy reference between actors. Therefore, while we need to recognize that the borders of the case studies are nowhere near clear and settled, we are just going to follow the practitioners and investigate two cases without defining where they begin and end in a static manner. Suggesting that the case studies are fixed entities with a

⁹³Sessions Court judgment of the Kasab Judgment.

binary inside/outside is fallacious. The case studies as they are presented here are only brought under way by means of this writing in which they are clearly bounded in their respective chapters. However we can follow Deleuze's and Guattari's advice that "[e]ach time, mental correctives are necessary to undo the dualisms we had no wish to construct but through which we pass". (Deleuze and Guattari 2004, 21) So while both the Nasir TCA and the Aftab TCA are presented in clearly bounded chapters in this work there is no such clear cut dualism between inside and outside, before and after as this would suggest and the necessary mental adjustments have to be made.

In addition to the case of Kasab to which this text regularly returns as a source of illustrative examples, the two main case studies can also be further defined. The first is the assemblage in relation to the 1997/1998 commuter train bombing in Mumbai. In this case we follow Aftab in his becoming terrorist and the assemblages that form around him. This is the Aftab TCA. The second case study is in relation to the 2002 American Centre Shooting in Calcutta, and it follows Nasir's becoming terrorist. This text refers to it sometimes as the Nasir TCA. These designations originate from my participant observation at the law firm representing Aftab and Nasir during their Special Leave Petition at the Supreme Court.

4.4 Interviews

This inquiry combines interviews with participant observation throughout both fieldwork periods. The interviews were semi-structured and undertaken with a range of predominantly Delhi-based actors involved with terrorism in India. All interviews were face-to-face and ranged in time from 20 minutes to well over four hours. Despite the wide range between outliers the majority of interviews took around one hour. Although some of the interviews were undertaken with other persons in the room the majority of interviews were one-on-one. In the rare cases where assistants or family of the interviewees were present they were usually occupied with something else and only in four occasions did someone in addition to the main

interview partner participate in the interview itself. Only two interviews were recorded as, after initial attempts, it very quickly became clear that actively involved actors would not speak freely when recorded. I did ask for and received verbal consent to use the information gathered in the interviews in a non-identifiable manner for academic purposes in all but one case in which a few anecdotes were only shared under absolute confidentiality.⁹⁴

Interviews were undertaken with actors from different areas in the TCA. I have loosely grouped interview partners in three categories, those working on security and investigations, those working in the courts and those writing about or influencing the other two. Not all actors involved in the TCA were interviewed and not all interviews were with actors actively participating in either the Nasir Terrorist Assemblage or the Aftab Terrorist Assemblage. Due to the extreme risk, security environment and a large number of practical difficulties, only one interview with a person convicted under counter terrorism legislation was possible. The role of prisons and detention centres as well as interrogation areas in stabilizing terrorists goes beyond this inquiry.⁹⁵ Chapter's 6 and 7 are about the Nasir TCA and the Aftab TCA respectively. In contrast Chapter 5 is a collage of actors and relations from a number of TCAs. Driven by my interviews with a

⁹⁴ Initial attempts to get interview partners to sign consent forms were met with high degrees of skepticism and outright refusal. In my opinion, the relatively small community of actors involved, the quagmire of political shifts, personal relationships, contempt-of-court laws and reporting procedures for members of the security services as well as police abuse and prosecution for individuals suspected of supporting terrorist organizations made people extremely wary of having their name associated with even research on the topic. The one instance of refusal to allow the use of their interview to be used only covered a small part of the actual interview and could potentially have resulted in legal consequences for the individual interviewed. It relates to a personal role in elsewhere well-documented practices and therefore still serves a corroborative function in the appraisal of other accounts.

⁹⁵ For an excellent discussion of detention practices and their role in the Indian TCA see (Ramakrishnan 2013).

broad range of actors its aim is to illustrate a variety of relations and tensions from within a range of TCAs. The 5th chapter also touches upon both the pre-existing legal assemblage and the pre-existing security assemblage and makes room for the actors to speculate about why we encounter shortcuts when we expect detours.

The three areas of courts, security and commentary encompass too many people to talk to every actor. Yet, their number is small enough that certain key individuals have connections to nearly all others. For sampling purposes, I focused on those key individuals using a snowballing method. The main thrust of the inquiry is to showcase how the terrorist is stabilized in two TCA's. The interviews play a role in tracing some of the tensions that are highlighted or made invisible in these TCAs. Further the interviews serve to illustrate the interaction between the TCAs and the wider legal and security assemblages they are fusing.

Preparing for the interviews was an integral part of the preparation for the overall fieldwork. An initial concern was to avoid leading the interview partners. As the issue of terrorism and counter terrorism is extremely sensitive, and the legal system is both a source of pride and a source of anguish for many educated Indians, the open, almost unstructured approach was aimed at allowing the interviewee to feel at ease and to identify by themselves the most interesting, problematic or otherwise relevant issue relating to the topic at hand. While this led to a wide array of answers, it also ensured that the factors influencing the reaction to the interview, and to the interviewer were reduced. Opening the interview with an expressed interest in security laws in India allowed the interview partners to make their own connections, which almost always turned to the topic of terrorism sooner or later. In preparation for the interviews, where possible, I studied some biographical data and other information about the interview partner, as well as their writing if applicable. In the final stage before the actual interview I usually had to have various interactions with employees or friends of the interview partner in the process of confirming the actual interview and finding

the exact location of it. Perhaps not surprisingly the reverse was also true as in a number of cases interview partners had undertaken some research on me before agreeing to meet.

While the interviews were intended as relatively unstructured, in practice some structures repeated themselves. A standard interview in the first phase of fieldwork would consist of a few minutes of small talk in the beginning, usually about the UK or Germany. This small talk would usually be followed by a brief description of my work from my side, focusing on my interest in India. I strictly kept this description vague and open. In other words, the descriptions would be along the lines of:

I am researching security laws in
India, their procedures and because
of your position as x, y, or z, I think
that your views on the topic would
be highly relevant to my
understanding. Could you tell me a
little bit about what the issues are
for you and how things work in
your everyday practice?

Following this very brief introduction, I would get the practical questions out of the way. Including questions such as: whether the interview partner would mind if I took notes; what I intended to do with the transcripts; what role they play in my work. Furthermore, I would agree with them that they would not be quoted in an identifiable way without their explicit permission. I would let the interview partner speak for as long as possible without further prompting. When necessary I asked questions relating directly to what they had said before, asking for clarification of ambiguous points, or mirroring their words asking for approval in order to clarify their points. The purpose for this was to create “a situation in which

the theoretical postulates/conceptual structures under investigation are open for inspection in a way that allows the respondent to make an informed and critical account of them” (Pawson 1996, 313). In other words, my questions were aimed at allowing the actor to explore and explain their own conceptualizations and to draw their own boundaries. Once their time ran out or I was convinced that there would be no further information coming from them in that particular session, I would ask if I could be in touch with further questions, or for a further meeting. This would then be followed by either some more small talk or my departure. I had decided early on that hand written notes would be the best way of striking a balance between collecting information and allowing the interviewee to feel comfortable. All interview partners agreed to me taking notes and only on very rare occasions asked me not to note down something they had said, or not to quote them on it. I typed up my handwritten notes as soon as possible, preferably immediately after the interview. In this typed recording I included in an identifiable manner, all impression, recollections and other relevant miscellaneous information about the interview. This added layer of translation and interpretation increased the necessary caution in appraising the results. But it also recorded a multitude of small impressions and interpretations that were present and plausible at the time of the interview yet would not be so any longer at the time of writing.

Often interview partners would suggest to me either some reading or some further people I should meet or both. This was very helpful in identifying more interview partners according to the snowball principle. During this fieldwork, I stressed quality over quantity, in conducting 43 interviews, out of which 31 generated relevant to the point information. The considerable variation in the length of the interviews obviously sets the scope for the amount of information which one interview partner would and could provide me with. Another factor is that some interview partners were limited to a specified scheduled time due to their other obligations.

This leads us to another point worth discussing here. As a clearly identifiable outsider, and a member of a respected, but very far away academic institution, I had both advantages and disadvantages that would affect the materials collected. The first effect was the occasional (and this might have something to do with my age as well) sense that they had to start at the beginning and not presume any knowledge on my behalf. This is a double-edged sword, on one hand this may limit the amount of sophistication the interview partner is able to engage in. On the other hand however, and I think this outweighs the disadvantage, this works really well with the assemblage method. Allowing interview partners to take the lead and guide me through their way of making sense of the relations between the direct question and terrorism minimizes my influence. That the vast majority of interview partners made the connection between procedures of security laws and terrorism very quickly is highly relevant. This bringing in of terrorism to explain and justify, or critique, various circulations shows that this inquiry is onto something. Even the basic views of the criminal justice system some interview partners presented were very interesting, both for what they highlighted and for what they silenced. As a novice to the intricacies of procedural laws at the time I was able to listen to the actors without immediately putting their words into my own legal frame of reference. This naivety with which I approached the study made some interview partners see me as a pawn in a wider game. Trying to use me to either annoy their rivals (by pointing me in their direction for interview – which incidentally worked out very well for me) or to air their wider concern about a number of issues. I therefore also enjoyed listening to a number of monologues about wildlife preservation, Bangladeshi immigrants and the impact of counterfeit rupees on the economy. Instead of understanding these as wasting my time and irrelevant to the wider study I think they illustrate a wider point about terrorism. While it would go too far to investigate this in depth in this work it seems that the invocation of terrorism is

also perceived by some actors as a license to bring out a number of issues they perceive to be ailing the world.

Finally, there was a willingness to talk to me about issues because I was not a member of their community, and hence was not seen as a potential player in the domestic political game. Therefore, quite a few interview partners were much more frank with me than I had dared hope.

4.5 Participant Observation

The second pillar of the fieldwork consisted of participant observation. Participant observation can be defined as “the process of learning through exposure to or involvement in the day-to-day or routine activities of participants” (Schensul, Schensul, and LeCompte 1999, 91). In addition to the interviews, I undertook two separate but occasionally overlapping participant observations. In the first instance of participant observation taking place throughout both field visits I attended the on-going trial in respect of the 2008 Delhi Bombings. Taking place at Tis Hazari court but later moved to Patiala House, during the course of these four months I was able to observe a Sessions Court in action. This observation entailed “the systematic noting and recording of events, behaviours, interactions, and artefacts (objects) in the social setting” (Marshall and Rossman 2014, 79). Since the court was technically open to the public, it was not particularly difficult to gain access.⁹⁶ Despite observation taking place “in plain sight in a public setting,” it was clear that it was not a case of me being a *complete observer* (Kawulich 2005, para. 6). Rather my research by default took the stance described by Kawulich as *observer as participant* (Kawulich 2005). It is clear that all attendees took note of my presence, and while I was not able to introduce myself to every individual in the courtroom I am confident that all could find out

⁹⁶ During the first fieldwork visit and the first half of the second visit the Trial was conducted at the Tis Hazari Court in Old Delhi. However it was then moved, at the behest of the prosecutor, to Patiala House, very near the Delhi High Court, Parliament and the Red Fort. At Patiala House the trial was conducted under the exclusion of the public.

why I was there. In fact the Judge sent his usher to ask who I was and why I was there the first few times of my attendance before recognising me. The prosecutor also made an effort to find out who I was. Since I interviewed a number of the lawyers present, and occasionally left with one of them for an interview afterwards, the defence was informed about me. It would have been impossible for me to talk to the accused directly as they were under heavy guard at all times. However, I did introduce myself to the father of one of the accused who used to wait outside the court to help the defence team carry their files and make photocopies. I am sure that he informed his son at the first opportunity. I was the only visitor at the trial. The courts at this level usually operate without any media or public scrutiny during the majority of their work. It is only in the sentencing stage of high profile cases that the occasional journalist might make their way into the courtroom. This means that the atmosphere is very closed and day-to-day work takes place with a routine manner that does not require awareness of constant observation. This stands in stark contrast to the Supreme Court where judges, lawyers and prosecutors are aware of constant scrutiny and therefore adapt their behaviour and speech.

Throughout both the interviews and the participant observation(s) actors reacted to me and to various aspects of my visible identity (DeWalt and DeWalt 2002). Generally my gender, class and ethnicity facilitated the access granted to me, whereas my age sometimes worked against me. Clearly there was a trade off between being granted access and always sticking out and being visibly identifiable as different, an outsider. This out-of-place-ness was particularly pronounced at the lower courts, the canteens/tea stalls of courts and police stations. Undoubtedly there are aspects of the TCA taking place there that were more strongly affected by my presence than in other places.

The second component of participant observation took place predominantly during the second field visit. Building on the contacts made during the first trip, I was able to participate in the drafting of

the Special Leave Petitions in respect of Nasir and Aftab at the chambers of Ms Nitya Ramakrishnan on 56 Todar Mal Road. During this period, which stretched over several weeks and included research, drafting and court visits where I was usually allowed to take part, I was able to observe the day-to-day processes taking place at her chambers. This involved not only observing the work, but also the interactions between her and her clients, the interactions between the members of her team and the way in which she prepared for court appearances and how they unfolded.⁹⁷ The arrangements with the chambers were discussed with the main participants and it was clear to all colleagues during the participant observation that I was there primarily to observe and to understand how these cases worked. Nevertheless, it was my “ethical responsibility [to] preserve the anonymity of the participants in the final write-up” (Kawulich 2005, para. 8.1). Therefore both the interviews and the participants (with the exception of Ms Nitya Ramakrishnan who is on public record as the attorney for Aftab and Nasir, and who agreed to identifiably take part in my research) are anonymous.⁹⁸

4.6 Legal Documents And Cases

A crucial part of the inquiry consists of the analysis of judicial documents and their affects. Chiefly, the focus is on the documents relating to Nasir and Aftab but arrays of legal documents play a role. In this context there were some difficulties. Interview partners often

⁹⁷ My main research interest related to the cases of Nasir and Aftab, but of course she also engaged in a variety of other cases throughout my participant observation. To ensure absolute confidentiality to her clients those cases are not touched upon here. Interaction's that took place because of those cases but were by no means particular to them will be used in an illustrative way but without contextualization. (For example in relation to file keeping or preparing for cross-examination or general differences between civil and criminal cases etc.).

⁹⁸ For an in-depth discussion of the pros and cons of blanket anonymisation and a rationale for a more discretionary approach see (Bishop 2005; Clark 2006; Grinyer 2002; Homan 1991; Horner 1998; Parry and Mauthner 2004).

referred to statistical claims about a range of topics as well as to documents and other actants. Yet, obtaining and verifying the sources and claims proved impossible for me for three main reasons. Firstly, the area of this work was particularly sensitive, leading to many documents only being theoretically available through a Right to Information Suit (RTI). Secondly, court archives suffer from extremely restrained resources, even in Delhi. There is often no filing system, no centralized records bureau and no systematic collection of documents. The mixture of lacking resources and conflicting interests and priorities create an environment in which the rigorous keeping of records is sporadic. Thirdly, there was widespread lack of digitalization of records at the lower court level, and even when there was digitalization, records were often hidden through an inaccessible filing system.⁹⁹ The system provided neither an incentive for the adequate keeping of records nor for the sharing of the existing records with researchers.¹⁰⁰ All in all I encountered higher levels of good will than I had feared from the anecdotes of other researchers. Nevertheless incidents of actors referring to documents that were not locatable abounded. Often extensive online research to find lower court cases turned up empty, and I had to rely on photocopies taken in lawyers chambers and word-processed email attachments of evidence.¹⁰¹

The reporting and archiving in respect of High Court and Supreme Court level is comparatively better, but nowhere near exhaustive. This led to the fourth obstacle for verification. The statistical claims

⁹⁹ Often the individual files are named at the discretion of the clerk and are impossible to find without the specific reference that depends on the clerks' willingness and ability to share.

¹⁰⁰ The archive assemblage in Indian Courts is certainly highly interesting, but is discussed in the case studies only to the extent as it is immediately relevant to the TCA.

¹⁰¹ This potentially imposes a limitation on some avenues of analysis, but since these are the same routes through which actors get a hold of documents and often the very same documents that they interact with I will not exclude these files but use them in a cautious way.

were often based on numbers and reports provided by NGO's, international organizations, human rights activists and other bodies, including the National Crime Records Bureau (NCRB). Numbers and statistics I encountered suffer from all the limitations of statistical findings and extrapolation. Additionally they are often based on each other or on more or less precise estimates. In the way that actors use these numbers for their purposes their abstract truth content does not matter so much here. However not being able to get hold of the original or to assess their production is somewhat limiting our ability to refer to them. Statistics, reports and other findings from institutional bodies often become actants in their own right, forming relations with other actants and leaving traces in judgments, arguments and stabilisations.

The fifth difficulty was that the Right To Information is only available to Indian citizens, and even when successful, lists gathered under this right often prove to be inaccurate. For instance, during an informal discussion, a fellow researcher showed me lists of cases he had received under an RTI suit that were meant to list cases brought under anti-terrorism legislation for one district in a particular time period. When he did receive the list it contained cases from other districts, it lacked some cases that the researcher was aware of had taken place in this district. It also included some cases which were not terrorism, other that had been dismissed before proceeding to the trial stage or lay outside the time period stipulated. In other words, it seemed like the list had been compiled in an ad hoc manner without much thought given to accuracy. This is exemplary of a larger problem relating to interacting with records without being able to also dive into the process of their making.

Archiving at all levels of courts is hampered by inadequate facilities, overworked staff, and a lack of incentive to actually keep accurate records let alone share them. It seemed that the only possibility to get hold of non-reported lower courts cases is to get the files from the lawyers as mentioned above. However, this led to the sixth problem that only well to do chambers had the resources to store files.

Particularly in high profile anti-terrorism trials, the complete records can fill a number of storage cabinets. With many lawyers operating out of a single small room (if not their own bedroom/a table outside the court), it is standard practice to give the files to the involved party at the end of the suit. This made it impossible to track down the lawyer's files for cases at the lower court level.

Both high courts and the Supreme Court have similar problems. Although the limitations are getting much less severe as one moves up the ladder of appeal. At high court level the reporting of cases increases, however there is still the problem that some of the terrorism trials are conducted in camera, the files are often archived inadequately and often the lawyers remain the only source for them. The Supreme Court in theory has comprehensive reporting of its cases online. However with dozens of judgments handed down each day, and a somewhat arcane website, one still needs to be aware of the particular case in order to find it. Manupatra and Indian Kanoon, allow for some research to be done into issues rather than cases, but their search engines, are of a standard, which does not guarantee the exhaustiveness of a search.¹⁰² This means that one needs to combine methods to find cases. These methods need to balance a combination of, publications such as the All India Reporter, online search, word of mouth but often still result in only a rough picture of how many cases there are, how they usually end etc.

In short, it is impossible to say conclusively how many cases exist under a particular law in India, or to compare their outcomes in a meaningful way. The thrust of this research however does not require this. As mentioned above, difficulties arise when actors make reference to actants that are untraceable for the researcher. This problem is by no means limited to documents. It exists in relation to a number of actants, I deal with it by referring to these actants as they are referred to by the actor bringing them up.

¹⁰² Both Manupatra (<http://www.manupatra.com>) and Indian Kanoon (<https://indiankanoon.org>) are websites that are used both by lawyers and researchers to quickly find Indian Cases.

4.7 Back To The Assemblage

The role of this chapter has been to establish the method for this inquiry. As such, it has explored the practical aspects of the fieldwork undertaken. In this last section of the chapter I link the fieldwork to assemblage thinking and ANT. Traditionally understood, the methodology section of a (social-) scientific work plays a great role in allowing others to assess the validity of the findings and compare the set up to other similar studies.¹⁰³ This chapter aims at providing a basis for others to assess the means by which I collected the information on which this work is based. At the same time it must be recognised that “method is productive of realities rather than merely reflecting them” (Law 2004, 70). The most straightforward interpretation of this is that the practical steps undertaken to collect information, decide which pieces of information are relevant and which ones should be dismissed has an effect on the findings. A deeper understanding suggests that a fluid and continuous tension is at work between the methods of inquiry and the production of findings and their representation¹⁰⁴ (Mol and Law 1994).

In the context of this thesis, method and methodology form a complex entity with affects.¹⁰⁵ They are perhaps better understood as a method assemblage. This method assemblage consists of the “enactment of [a] hinterland of pre-existing social and material realities [...] and its bundle of ramifying relations” (Law 2004, 13). To understand this I need to clarify a few concepts. Hinterlands are ubiquitous and they play a role that can be described as territorializing fluid space. In a fluid space “elements inform each other but in continuously changing ways”. Hinterlands are the baggage that comes

¹⁰³ That a study must be replicable is often taken as the ultimate test of reliability, but is ruled out by the contingent arrangement of the assemblage.

¹⁰⁴ While Annemarie Mol and John Law’s argument in this article is about the production of anemia in medical institutions in the Netherlands and in Africa many of the mechanisms they identify are transferrable to this investigation into the production of terrorism in legal institutions in India.

¹⁰⁵ For an in depth discussion of complexity in the social sciences see (Mol and Law 2002).

with the attempt of charting that space (Mol and Law 1994, 663). When a hinterland is enacted as part of a method assemblage it's *bundle of ramifying relations* latch onto the indefinite tensions in the fluid space and order them. Thereby superimposing their order. Metaphorically this is the draining of the fertile swamp to replace it with productive fields and an efficient road system. The result of this is that "parts of the out-there are made visible while other parts, though necessary, are pushed into invisibility" (Law 2004, 70). The fluid swamp is replaced with bounded fields crossed by well-trodden roads. This argument is bound to play into its own enactment of pre-existing social and material realities in one of the well-recognised weaknesses of assemblage thought and especially its ANT successor (Law and Hassard 1999).

Assemblage thinking is often counterintuitive to traditional theory and especially social sciences' claims at simplification and prediction. This tension and awkwardness extends to the relationship between traditional social science methodologies and the methods of the assemblage. This is not to say that assemblage thinking requires the rejection of methodologies such as the ones above, such as qualitative interviews, participant observation or case study approaches. Far from it! Yet, tension and awkwardness arise from the necessity to use those and other methods in a deliberate and conscious way, which neither naturalises their epistemologies nor reifies their way of gaining knowledge. As Law puts it:

[M]ethods, their rules, and even
more methods' practices, not only
describe but also help to *produce* the
reality that they understand. [...] if
methods tend to produce the reality
they describe, then this may be, but
is not necessarily, obnoxious. [...]
But what is important now is to

note that if these two claims are
right then they have profound
implications for our understanding
of the nature of research (Law 2004,
5).

Taking Law's second point as encouragement, this thesis uses a case study approach with interviews and participant observation, and combines it with other methods such as the study of legal documents to weave a rich picture of material semiotic interactions (Law 2008). However, at the same time, the propensities of various methods for feeding the reality they seek to describe are acknowledged. Following the traces of actants from the heterogeneous practices of the TCA to the smooth narrative of the judgment interlaces theory and method. As this chapter is in a way about the *nature of research* rather than a straightforward methodology discussion, it makes sense to revisit one important point from the previous chapters. While writing this thesis three questions arose regularly: is/are *assemblages* a theory or a way of thinking? What is the difference? What are the implications for my work of seeing it either as a theory or as a way of thinking? Ultimately in this thesis I use assemblages in a way that suggests that it is a way of thinking rather than a theory in a more restrictive sense. This is on the one hand to avoid being drawn into predictions that go on to straightjacket, calcify and territorialise facets of the tensions that I seek to show at work. On the other hand, this is to avoid introducing a separation and hierarchy between theory and method. This is why these questions form a constant backdrop to not only this chapter but also the entire inquiry. Both implications lie just under the surface of many traditional social science understandings of theory. Which "passed down to us after a century of social science tend to work on the assumption that the world is properly to be understood as *a set of fairly specific, determinate, and more or less identifiable processes*?" (Law 2004, 5). To use assemblage thinking requires awareness of the implications

of the relationship between theoretical and methodological components, jointly forming a productive process by engaging with the narrative of the thesis.

Chapter 5 – Productive Mess

5.1 Introduction

In this chapter I use my interviews and my observations during the participant ethnography to situate the emerging TCA. The particular focus is on allowing the actors to speculate on elements of the chain of reference that articulates terrorist facts. In exploring these tensions I follow the lead of my interview partners to focus on elements they find surprising, as well as their differing interpretations of detours and shortcuts in making the terrorist speak. This is important for two reasons. Firstly because we need to resist superimposing our own ordering strategies on the disparate traces that are uncovered. Each of my interviews produced a number of points and traces. But they do not easily map onto a smooth flat plane. For example the points made about the prosecution from a human rights activist or a security professional may seem mutually exclusionary. Each speculating that the prosecution is in the pocket of the other party. I am not suggesting that the truth lies in the middle, but rather that there are two traces that cannot be mapped onto the same smooth surface, two attempts to make sense of an apparent gap in the chain of reference at the heart of the terrorist fact. This means that while I loosely associate some points with the pre-existing legal assemblage and others with the pre-existing security assemblage this association is not stable or permanent. In the sense of territorialisation it means a circulating habit of association rather than fixed, solid reliability. Secondly this is important because it is this messy, productive swamp of fluid circulations and tense relations that so strongly contrasts with the smooth, stable self-speaking account of the terrorist emerging out of the TCA. This chapter therefore directly speaks to the following two case study chapters that show what mechanism are at work in the TCA to make the terrorist speak and to articulate terrorist facts.

In addition to the two territorialising tendencies in the hinterlands of the TCA, legal/law and order and security, another reoccurring theme is a tension between process and procedure. We can

understand this tension as a battle over the vincula used to attach insignificant events to the corpus of texts. Each enrolment, each vinculum remains controversial and contested for some actors. Yet as the chain of reference builds the tensions between shortcuts and detours become increasingly suppressed. The tensions between security and law and order (see section 3.2) are reflected in the literature on terrorism in India.¹⁰⁶ However, their role in the making of terrorists is more complex than a focus on corruption, incompetence or securitisation can account for. (Laqueur 2003) It is the tension between modalities of security and modalities of law, which play out in the TCA. This tension often shows stabilisations succeeding which are seriously criticised by some actors. Or on the flip side results in, solid links between actants suddenly being called into question and failing. The sentencing to death of the so called 'printer group' by the Sessions Court in the Nasir TCA is one such example of a seemingly unlikely terrorist stabilisation succeeding.¹⁰⁷ At least for a time, before being overturned by the High Court.

The Nasir TCA and the Aftab TCA came up occasionally during my interviews, as well as a host of other cases and anecdotes. The interviews explore how actors themselves make sense of the making of terrorists, the involved territorialisation and the role played by the courts. They are therefore a crucial step towards understanding the tensions that flow through any TCA, as actors express their endorsements, surprises and critiques of other actants. The tension between security and law and order is one of the strongest forces shaping how actors make sense of stabilisations. Many actors refer to a conflict in the TCA between individual rights and national security. Most of them position themselves on one or the other side of this divide with regard to the terrorist. This tension is also reflected in a slightly more abstract form in the tension between procedures prescribed by law and process. Processes are influenced by, but often

¹⁰⁶ See for example (A. Goswami 2002; Srivastav 2005; Raju 2004; J. Eckert 2012; J. M. Eckert 2003, 1999; J. Eckert et al. 2012).

¹⁰⁷ We will encounter the Nasir TCA and the printer group in Chapter 6.

divergent from coded procedures. One very important observation that comes out of these interviews is that many actors for whom security is more important than law and order, perceive rights and legal procedures as inherently favouring the terrorists.¹⁰⁸ It is also clear from the interviews that for some actors the making of terrorists is a naturalised connection made in their minds between an incident and a shadowy enemy. Due to the ubiquitous reified connections terrorists are treated as discoverable, pre-existing essences. Ultimately these interviews provide an insight into the making of the links in the chain of reference that articulates the terrorist fact. These links are individual micro associations, including stabilisations, vincula, detours and shortcuts. Starting from the judgment we are digging back along the chain of reference which articulates the terrorist fact. At times some chain links cause our surprise because they look nothing like expected. Where we thought to find a slow, deliberate, hesitant detour we encounter a shortcut, a blank space or a gap in the solid chain. The interviews serve to identify these gaps as actors perceive them but also to begin filling them with some of the speculations of the actors. A large share of this speculations centres on tension between security and law and order. Despite this well known dichotomy the picture emerging from the interviews is one of contradictions and plural truths. In order to structure this chapter I zoom in on two main tensions we can also observe in the two case studies. These are the tension between security and law and order/rights and the tension between procedures of law and processes of the TCA. In the words of the TCA these are the moments where lacunae emerge in the chain of reference and they are filled with speculation that relates to shortcuts and detours or the embattled vinculum. Without a doubt many articulations of these tensions would be familiar to some scholars from their respective fields. Despite the risk of some repetition, the way actors themselves

¹⁰⁸ In line with the need for a blanket anonymity described in the Methodology Chapter, the interviews are numbered continuously between fieldworks I and II. This passage for example draws on Interview XXX from fieldwork I.

are making sense of the TCA is relevant. Some actors argue that it is these tensions that prevent them from protecting the state effectively by making it hard to go after terrorists. Others are infuriated that the tensions allow the rights of alleged terrorists to be trampled in court. What we are presented with is a fractal reality where opposing currents are at the same time influencing circulations. These currents can become a choreographed, balanced tension that is then inscribed in the judgment through the TCA, substituting a tense balance for univocal stability. Only through the choreographing efforts of the actors and the ordering momentum of the legal assemblage, does the judgment gain properties of stability, timelessness and permanence, once mature the terrorist facts can be left to speak for themselves. This permanence then also infuses the stabilised terrorist. Connecting her to all other terrorists, which increase the stability of that connection to the point where even subsequent judgments struggle to undo it.

The chapter proceeds in three parts. The first part (Section 5.2) focuses on the tension between security and law and order. The second part (Section 5.3) addresses the tension between process and procedure. Finally the third part (Section 5.4) goes back to choreography and stabilisation and the role of the judge and the TCA.

5.2 The working Background of the TCA

The TCA does not emerge out of thin air. Instead the TCA brings together actants from two pre-existing assemblages, namely legal and security. These actants are arranged in new constellations as part of the TCA. In what I loosely define as success or failure they are either enrolled in a successful, balanced choreography to make a terrorist speak, or failing to do so, in which case the TCA also falls apart and no terrorist facts emerge. The two case studies in chapters 6 and 7 demonstrate how the TCA balances the modes of articulation of law and order with those of security. The smooth narrative and stable terrorist that emerge out of the TCA are surprising in light of the heterogeneity and ‘messiness’ that we encounter in this chapter. Actants from pre-existing assemblages are enrolled in the TCA but bring with them additional layers of tensions. These tensions reflect the territorialisation of the pre-existing assemblages along lines of security and of law and order.¹⁰⁹ As such the successful TCA exposes itself to critiques from both sides of the divide, but not in a way that endangers its continued operation. Rather the suppressed links in the chains of reference that are being crafted cause for speculation among actors. Following a discussion of these two pre-existing assemblages and how they make themselves felt in the TCA the section turns to the temporal and spatial dimensions which add yet another layer of complication to the TCA’s hinterlands.¹¹⁰ Finally the section returns to the core role of the chapter that is to show the heterogeneity and messiness that forms the backdrop to the TCA’s stabilizations and reifications.

5.2.1 Outlines of the Pre-existing Legal Assemblage and Pre-existing Security Assemblage

All actors I interviewed and the ones I observed have an individual perspective and a personal account of these tensions. These accounts, while occasionally overlapping, touch upon a wide variety of tensions.

¹⁰⁹ To which for facility’s sake I also refer to as ‘legal’ assemblage.

¹¹⁰ Hinterlands are introduced in Section 4.7

Some of the tensions in the TCA that actors articulated for me during our interviews are between: process/procedure; the sense *making* of actors; proactive/reactive encounters with the terrorist; jurisdictions; terrorist/terrorism; regular law/special law; doing something/being seen as doing something; legal procedure/judicial discretion. Each of these tensions was brought out by at least one of the actors in my interviews as having a bearing through the TCA. It is traces of these tensions, and the way in which they influence the circulations and stabilizations, that make up the TCA. At the same time many of these tensions are coproduced with the understanding of terrorism as a law and order issue or as a security issue. By this I mean that they evolve simultaneously and inseparably from each other. The tension between the pre-existing security assemblage and the pre-existing legal assemblage run through many of the relations between actants. This tension is also expressed through the continuous dissonance between process and procedure. Where process is the unfolding of events and procedure is the normative description of process in law.

5.2.1.1 Success and Failure of the TCA

Assemblage thinking informs us that these tensions, when understood as dualisms, are a product of the TCA. Since the making of the terrorist in the TCA is influenced by the territorializing tensions between security and law and order. The making of a terrorist in the TCA brings together actors who have very different notions on the role of the law and of effective counter terrorism and forces them to cooperate in a chain of reference leading to a stable terrorist fact. Making the terrorist speak requires a stable chain of reference, expecting a chain of reference as the one described as part of the passage of law by Latour leads to some surprising lacunae. The interviews offer a view of how actors in the TCA speculate on what fills these lacunae. Since the chain of reference operates to articulate the judgment and results in the terrorist speaking it cannot contain gaps, therefore the lacunae must be made of something we cannot see directly. The speculation of the actors allows us to trace these surprising shortcuts in the chain of reference. Often the focus of the

interview partners is on interactions between actors engaged in security assemblages and actors engaged in legal assemblages. However we also need to contemplate the possibility of the TCA failing. And by this I mean the entire TCA falling apart rather than the stabilization of the terrorist only. In other words, failure for the TCA is not to arrive at acquittal, but for its actors to cease interacting. This leads to pressure on some actors to participate in the TCA in such a way that it remains functional and keeps its actors locked in interactions. The alternative to sustained and balanced interaction is one where the actors operate fully outside of the TCA, on the one hand focusing entirely on a war-like mode of interaction with suspected terrorists, and on the other hand, fully embracing the legal assemblage. In cases where the interaction is not balanced, the security assemblage and the legal assemblage risk working antagonistically and divisively. The threat of avoidance to the TCA as part of the legal assemblage is forcefully illustrated by the encounter killings of suspected terrorists by the security forces. In my interviews, I recorded instances where members of the security organs have lamented that whenever they cooperated with the courts, terrorists risked being set free.¹¹¹ During my participant observation at the Tis Hazari Court, a disgruntled Special Prosecutor Rajiv Mohan slowed the proceedings to a two-week standstill after the Judge refused him a request. The power of non-participation, extra-legal action and boycotting of the Court has the potential to put a lot of pressure onto the continuous churning required to keep the TCA alive and in some cases undoubtedly causes the TCA to fail. In many cases, including our two case studies, the TCA does not fail. Even staunch critics of the many abuses that are possible both outside of and under the special legal regimes maintain that justice is achieved through the TCA every now and again.¹¹² Additionally, the cyclical nature of the special legislation leads people to always

¹¹¹ Interview XXX, Fieldwork I

¹¹² A number of interview partners repeatedly referred to justice but without necessarily sharing an underlying notion of its meaning, except that it was a desired outcome of the judicial process.

remember both a time when things were worse and a time when things were better, leading to a certain belief in the Indian system as a whole.¹¹³ Justified as this belief may be, it seems clear that while things have a tendency to get better on paper, the changes in practice are minute. This leads to the relatively glum conclusion for one actor that, “the laws keep coming, every time we believe that a law has been gotten rid of it comes back in another form.”¹¹⁴ Despite these difficulties, many actors do not walk away and continue to engage with the TCA. While my case studies focus on successful TCAs, it is important for us to remember that the possibility of failure looms. For the TCA to successfully articulate terrorist facts two pre-existing assemblages have to be co-articulated and at times reconciled.

5.2.1.2 The Pre-Existing Legal Assemblage and Legitimacy

The first pre-existing assemblage is the legal one. By pre-existing I mean that no TCA comes into being in a legal vacuum. Ideas of law, order and legality as well as an entire legal assemblage are already in place and constantly churning. Many actants that become enrolled in the successful TCA are also enrolled in the legal assemblage and bring with them territorializing tendencies and tensions. The pre-existing legal assemblage also contributes to the legitimacy, and therefore the reach, of the TCA.¹¹⁵ Latour has discussed the workings of the pre-existing legal assemblage in depth but successful terrorist articulation goes beyond the passage of law. (Latour 2004)

One of the most striking findings in my fieldwork was the overall faith of my interview partners in the legal system and in its legitimacy.¹¹⁶ Most interview partners, believed, explicitly or implicitly, in the rule of law and the legitimacy of the legal system as a remedy to

¹¹³ Interview X, Fieldwork I.

¹¹⁴ Interview X, Fieldwork I

¹¹⁵ Some have also argued that the counter terrorism in itself also confers legitimacy (Kapur 2005, 176).

¹¹⁶ I am using the phrase ‘legal system’ in this chapter to reflect the use of the phrase by the actors themselves. This largely overlaps with the pre-existing legal assemblage we encountered in section 3.2.

social injustice.¹¹⁷ Yet actors' perception of the courts went beyond the potential for some forms of social justice. During the participant observation, the faith of the actors around me was even stronger and unwavering.¹¹⁸ While some actors express their concerns about the difficulties faced by minorities, particularly in security legislation as a partial critique of the legal system, many would still see the legal system as providing the potential for remedies as well. Li describes this particular distinction as a will to improve.¹¹⁹ The desire to improve the status quo, by sticking to the system at hand is always both critical and supportive of the system. In other words, while a critique levelled at abuses within the legal system or at particular individuals can cast doubt on the effective functioning of particular components and processes, it at the same time reaffirms the whole and the universal validity of the system.

Nevertheless some interview partners perceived the legal system, including the courts, in a very critical manner. One of the most fundamental critiques levelled at all courts including the Supreme Court is that they exist within the communal, casteist and patriarchal framework of bias, which imbues all of Indian society.¹²⁰ This makes the courts problematic and deeply suspect for their complicity in maintaining these structures.¹²¹ This is illustrated amongst other things through the upholding of police orders, even when those orders disagree with the overall conclusion of the case. In other words, the courts always make an effort to avoid slapping the police on the wrist for transgressions against both procedural and

¹¹⁷ For example, Interview X, Fieldwork I, kept returning to the idea that while things had been both better and worse the avenue for social justice was the courts.

¹¹⁸ I would draw the ire of Ms Ramakrishnan every time my questions became too pointed or implied criticism of the legal system / court – finely distinguished from its practitioners which she also openly critiqued.

¹¹⁹ The idea of the will to improve has been explored in depth in (T. Li 2007).

¹²⁰ Interview VII, Fieldwork I.

¹²¹ Interview VII, Fieldwork I.

substantive laws.¹²² This is something that I have also encountered in my observations. It is necessary for the courts to avoid antagonizing the police. If the police do not willingly cooperate with the courts, this will lead to a breakdown of the TCA. Therefore many judges take a long-term perspective and prioritize the expectations of some actors over others. In contrast the police may be more willing to engage in brinkmanship for individual short-term gains. Occasionally judges' patience encounters its limits, and thus there is a certain degree of heterogeneity amongst judgments on security related matters, which is at the same time positive and negative. On the one hand, it is positive because it allows some people to get access to justice, while it also demonstrates that the whole is not centrally controlled. This illustrates the heterogeneous and in flux working of the assemblage. On the other hand, it is problematic because it does away with one of the other cornerstones of a legal system, namely predictability. If it comes down to, as one interview partner put, "a matter of luck, if your bench is good or not" this defies the principle that law ought to have an element of predictability in its application.¹²³ However, despite this conclusion, the assemblage keeps working and the actants remain engaged with it, even when they make sense of their interactions and engagements with reference to systemic failure and luck.

A successful enrolment of actants from the pre-existing legal assemblage is necessary to keep the TCA from losing legitimacy. If the TCA becomes regarded as a kangaroo court it loses much of its reach. The mode of interactions is therefore often marked by the slow, hesitant and deliberate manner of described by Latour in his observation of the Conseil D'Etat. The meticulous crafting of chains of references, one *vinculum* at a time, to enrol current actors and pre-existing legal actors in tandem, is the hallmark of this process. Yet at times we can observe the TCA moving rapidly, with speedy connections between actants and other actants that bear little

¹²² Interview VII, Fieldwork I.

¹²³ Interview VII, Fieldwork I.

resemblance to the laborious detours and modes of agencement of law. The other pre-existing assemblage that plays a huge role in the TCA is that of security.

5.2.1.3 The Pre-Existing Security Assemblage and Effectiveness

The second pre-existing assemblage that shapes the modes of associations of the TCA and is crucial for the successful articulation of the terrorist can be loosely termed a security assemblage. Constantly police officers are patrolling the streets, intelligence agencies are monitoring communications, commandoes and paramilitaries are training in counter-terrorism exercises. These actors and other actants are a fundamentally necessary part of a successful TCA. If their enrolment fails the TCA loses its ability to articulate the terrorist. If the security organs stop cooperating, the pre-existing legal assemblage becomes ineffective. But even before they cease to cooperate, the modes of association of the security assemblage are sine qua non of terrorist articulation. The enrolment of security actors into the TCA has two objectives. These actors are needed to provide the TCA with its input, so their enrolment can be investigative, forensic and contributory. The police, some parts of the intelligence community come to mind, but in areas where paramilitary organisations play a significant role in administering law and order they can also be enrolled in such a fashion. The security organs are also needed to carry out and adhere to the orders issued by the TCA. In this sense their enrolment is executive. The divide between the two is not usually clear cut, blurring particularly occurs when actors tasked with investigations, such as the police, engage in this task, but do not adhere to the guidelines set by the legal assemblage for its pursuit. Failure to successfully enrol actors from the security assemblage into the TCA results in failure or ineffectiveness. But a perhaps more significant contribution by the pre-existing security assemblage are its modes of association. Rather than to employ the slowly meandering, hesitant and deliberative mode of the passage of law, the passage of security is quick, reflexive, jumping to conclusions via the shortcuts of pre-established patterns. A chain of reference

crafted using both modes can only be unearthed with recourse to both modes. For terrorist facts the chain requires a choreography of both modes in order to make the terrorist speak.

The security forces are a highly ambivalent actor on the Indian scene. On one hand the esteem for the military remains high amongst the population. On the other the proliferation of paramilitary security organizations leads to a blurring of lines and people wearing the uniform of the state commit many atrocities. The Salwa Judum is perhaps the most notorious example but even the more orthodox elements of the Indian security apparatus have been blamed for a large number of atrocities over the past decades. In case of atrocities being perpetrated either by the security organs of the state or even by the Hindu right wing, it does not matter what the text of the law says prosecution will not take place.¹²⁴ This absence of prosecution illustrates the difficulty, read impossibility, of engaging in investigation and prosecution without the cooperation of those very security organs. Furthermore, there is a sense that unjustified procedural acquittals partly explain the source of police frustrations, which then leads to extrajudicial killings. The mere fact that some people believe that the causality runs from difficult to implement procedural rules to the complete breakdown of procedure, is illustrative of some of the cohesion difficulties of the TCA. My interviews with security personnel support the existence of this view. Although all comments in this direction were given only under the strictest confidence, it seems that internally, amongst those tasked with protecting the state, there is a disdain for the law and a sense that in order to protect the state one has to move outside of legal confines.¹²⁵ While the security organs of the state and the military way of addressing the terrorism issue are by and large outside of the ambit of the courts, there are some cases in which classified intelligence

¹²⁴ Interview VII, Fieldwork I.

¹²⁵ E.g. Interview XXX, Fieldwork I.

reports have made their way into the hands of judges, in order to inform their decision, but this is all informal.¹²⁶

The pre-existent security assemblage is also far from homogenous. Tensions between actors are ubiquitous and influence their relations to the TCA. The military and the security organs of the state distrust the police. This causes a number of problems in co-operation, the Research and Analysis Wing, has no legal remit to operate on Indian soil, but a former director and my interview partner maintained that the information passed on to internal sources is lost in the mills of bureaucracy and institutional turf-wars.¹²⁷ As such, the view of the police expressed by intelligence professionals is scathing. According to one interview, not only is the ratio of population to police in India one of the lowest in the world, but they are overworked, undertrained and not in the XXI century.¹²⁸ While the police's importance in counter terrorism cannot be overestimated, they are the cutting edge of bottom up intelligence as well as community presence, this is a fully unrealized potential.¹²⁹ Thus the intelligence passed on, or held by the police, is poor not only due to their lack of training but also due to the lack of adequate databanks to store and access information, therefore when a bomb goes off somewhere, there is very little knowledge of how this could have happened which then leads to a problematic reflex reaction of rightly or wrongly arresting somebody, just to do something.¹³⁰ This then leads to a cycle that has further alienation inbuilt into the often terrifying jail, court and police institutions.¹³¹ This process is of course viewed as absolutely detrimental to an integrated counter terrorism strategy by some other actors. These cycles are then further fuelled by the many processes that take place outside of the law. According to this interview, it is important to give protection under the law to those actors you deploy

¹²⁶ Interview XIX, Fieldwork I.

¹²⁷ Interview XXVI, Fieldwork I.

¹²⁸ Interview XXVI, Fieldwork I.

¹²⁹ Interview XXVI, Fieldwork I.

¹³⁰ Interview XXVI, Fieldwork I.

¹³¹ Interview XXVI, Fieldwork I.

against terrorist, thus the Armed Forces Special Powers Act for example is not in itself a bad law, it is then being used in an abusive way, but if one is to use the army or other security forces domestically then it is important to give them legal protection.¹³² The core problem is that of extra-legality, when there is either no law, which protects or empowers the security forces being used, or there is a law but it is regularly flouted, this circumvention of the legal apparatus takes away one of the most precious assets a state has in fighting terrorism.

Amongst the military arm of the security services many actors express a distrust of the courts.¹³³ This extends to the entire criminal justice system in so far that, allegations are raised that due to corruption within the political elites, the police and the courts, predatory elements which have been caught at great risk to the security services are then released for politically opportunistic motives.¹³⁴ This leads to a sense amongst some members of the security organs that turning over suspected terrorists to justice is a mistake, which will potentially set them loose again. From this point of view the human rights lobby is also threatening as it impedes the necessary every day work of those tasked to protect the country. The frustration is understandably great, when members of the security apparatus die on a regular basis in areas such as J&K and the North East, but the only response in Delhi seems to be one of bashing the security organs for the bad job they are doing.¹³⁵ It is important therefore to note that the allegations of inadequacy of laws and the judicial system come from both sides as it were, the military/security apparatus feeling ill equipped with tools, sold out and abandoned in a tough area without freedom to defend themselves, and the minorities and activists on the other side who perceive that this opens rooms for abuse. The tension both within the security assemblage and between the security assemblage and the legal assemblage all too easily spill over into the TCA. If

¹³² Interview XXVI, Fieldwork I.

¹³³ Interview XXX, Fieldwork I.

¹³⁴ Interview XXX, Fieldwork I.

¹³⁵ Interview XXX, Fieldwork I.

suspected terrorists are never brought to the courts the TCA fails before it can even assemble. If institutional turf-wars hamper the collection of evidence, or poor training and incentives cause faulty procedures, the TCA either needs to shortcut past these elements of the passage of law or it fails in its stabilization and articulation of the terrorist.

The mixed picture one observes, with judges sometimes rejecting cases and sometimes displaying the same communal bias and state preference as the police, is a function of the arrogance induced through the overall framework in the security organs. This arrogance according to some of my interviews is responsible for the investigating organs becoming complacent and thus producing cases that are so full of holes that the judge is compelled to dismiss them.¹³⁶ From my own observation judges who are sincerely trying to do justice are still extremely reluctant to dismiss cases.

Tensions in the pre-existing security assemblage notwithstanding its actors are an essential part for the TCA. Successful investigation, prosecution, stabilization depends on their successful enrolment. Failure to do so results in extrajudicial killings, tainted evidence and cases that are suspended in limbo because they seem neither dismissible nor prosecutable. To enrol these actants successfully however very often stands in tension with the enrolment of actants from the legal assemblage. To further complicate the picture both of these pre-existing assemblages are also uneven across time and space. In other words, how they present themselves and what influence they have in the TCA is contingent on location and historical background.

5.2.2 Outlines of the Temporal and Spatial Scope of the Hinterlands

In addition to TCAs not emerging out of no-where they also appear in a particular spatial and temporal context. In other words when and where a TCA assembles has an influence. On one hand the spatial dimension plays a role. Whether a TCA emerges in Delhi or in

¹³⁶ Interview VII, Fieldwork I.

Kashmir plays a role. This is an aspect that is looked at in more detail in sub-section 5.3.6 on spaces and locations. Suffice it to say here that the location of emergence influences more than the jurisdiction, but also a host of other factors such as the relationship between the two pre-existing assemblages. Both the location of the incident plays a role; a bomb blast outside of the Indian Parliament in Delhi has a different impact on the TCA than a blast in Srinagar, Jammu & Kashmir. On the other hand the temporal dimension determines the historical baggage a TCA has to contend with. From the point of view of articulating terrorist facts some required shortcuts and some detours are provided by the setting.

An example that illustrates both the spatial and the temporal dimension of the hinterlands, and that was brought up repeatedly by interview partners was the insurgency in Punjab from the early 1980's to the 1990's. During the Punjab insurgency, courts often ceased to function properly because insurgents regularly intimidated the judges, the witnesses, the prosecutors etc.¹³⁷ Courts were held inside prisons, with anonymous judges and witnesses, to guarantee their safety. Neither the judges nor the prisoners/accused were publicly questioned. Actors I spoke to often interpret this in various ways. The necessity of protecting all those involved in the context of a far-flung insurgency is seen as an explanation. Others see it as an attempt by the state to avoid the oversight of the media, the public and ultimately even the courts. It is against this background that many interpret open courts as an achievement, one that is being resisted by some parts of the state machinery.¹³⁸ Achieving open courts shows that legal assemblage also has an influence on the TCA. Therefore, the courts that are held with public admittance, with witnesses who show their face and judges who sign their name to the judgment are signs that the choreography ultimately includes a give and take

¹³⁷ Interview XI, Fieldwork I.

¹³⁸ For example my visits to Tis Hazari Court, mentioned in the Introduction were ultimately ended by the High Court granting the prosecution's request to transfer the trial to Patiala House in Delhi where it would be continued *in camera*.

between both security and legal assemblage. It is in this sense that some observers who have been following this for a long time disagree with the interpretation that everything has gotten worse. They rather argue that today the courts are much more careful and much more attuned to the dangers of blindly trusting the police than in the past.¹³⁹

The consciousness towards space and time displayed by many actors shows that these are dimensions requiring our attention throughout both this chapter and the case studies. However this also adds another layer of contingency to an already very complex background for the TCA.

5.2.3 Heterogeneity and ‘Messiness’

The background, pre-existing legal assemblage, pre-existing security assemblage as well as temporal and spatial contingency, cannot exhaustively be mapped. Its elements are in flux and are influencing and informing each other continuously. This creates a heterogeneous picture that appears ‘messy’ to the uninitiated. However all actors skilfully navigate these changing currents and make sense of them for their purposes. My aim in this chapter is not to superimpose my order onto the different sense-making strategies. Rather my aim here is to illustrate how heterogeneous and messy the swirl of actants-in-waiting is so as to fully appreciate the stabilising efforts of the working TCA in the case studies. In the previous sections we have encountered four aspects of the hinterlands of the TCA. But in line with assemblage thinking this inquiry needs to follow the actants themselves. In tracing associations through my interviews results in a picture which greatly increases the ‘messiness’ we have to contend with. Actors use a wide range of linguistic and conceptional registers to make sense of what they are doing. In contrast to the participant observation or my ethnographic recordings in court all tracing undertaken in the interviews is further mediated by the actors’ self-translation. It constantly emerges that the deliberate and hesitant

¹³⁹ Interview XI, Fieldwork I.

passage of law is interrupted by shortcuts and jumps that are difficult to account for using the established logic of *la fabrique du droit*.

5.3 Actors and Actants in the build-up to the TCA

TCAs assemble out of a messy swirl of actants circulating in pre-existing assemblages. Through my interviews I let these actors speak for themselves. This further accentuates these contradictory, heterogeneous and messy circulations. Mapping these traces is impossible onto a single smooth plane. Contradictions and tensions are rife, but in order to provide us with a road map of general areas to visit, the section is split up into seven subsections. Between these seven subsections there is some overlap and some contradiction and borders are not always clear-cut. But since it is this heterogeneity which gives rise to the smooth, stable terrorist in the successful TCA we can just take it all in before it falls into place in the next two chapters.

5.3.1 Laws

The first group of actants to encounter in my interviews are laws. They clearly leave traces in the TCA but their role is far from clear-cut. Different actors have different takes on the role of laws and the types of laws necessary to fight terrorism. Laws play a role in fighting terrorism, but actors are far from agreed whether it is an enabling or a hindering role. Furthermore the types of laws involved in TCA's can come from a range of legal instruments, including procedural law, special laws, general laws and even constitutional and international dimensions. One central element of making the terrorist speak is through the *vincula* we have encountered before. Each *vinculum* ties an otherwise insignificant event to a pre-existing piece of text, such as a law or the record of a precedent. Each little bond strengthens the coherence and stability of the TCA, but not all attempted micro-stabilisations are successful. Above all it is important to notice that the bonds which are being formed as part of the TCA are at times the ones we are familiar with from Latour's work on the passage of law and at times are marked by a different mode. Each of the case studies

shows how incidents are translated into laws therefore that is not at the heart of this section. The translation, and creation of vincula, requires work in practice and leaves traces. However in my interviews I found it very hard to pinpoint the time when the accused start to become terrorists. My interview partners told me that it is different from case to case, but that usually cases arrive before the court as already involving the concept of terrorism. Indeed my question puzzled both interview partners and colleagues during the participant observation, who asserted that it either is terrorism or it is not. This view contributes to the reification and naturalisation of the outcomes of the TCA. In most interviews terrorists were treated as inputs of both legal and security processes and considerations. It is only through the careful tracing in the case studies it becomes visible that they are outputs of these processes. This is a caveat that we need to keep at the back of our minds, while the language used in the next section draws on the interviews and therefore makes this step invisible. Interview partners told me about laws as something which is sometimes a political play ball (intermediary) and sometimes a transformative structure or playbook (mediator). This understanding that law is both something which influences other relations and enters into its own relations is crucial to understanding the tensions between accounts of regular laws and general laws.

5.3.1.1 Regular Laws

Vincula to regular laws form the backbone of the case studies in chapters six and seven. In my interviews however the actors positioned them as the backdrop to the special laws. This reflects the tension between laws that can act both as intermediaries in the tense relations between actants or as mediators changing those interactions. The specifics of the laws involved in the two case studies are discussed in the respective case studies. Here the focus is on how the actors that I interviewed reflected on their own and other actors' interactions with laws. This means that while we encounter regular laws in their function as mediators in the case studies, here the focus is on their role as intermediaries between actors. As intermediaries

regular laws are a play ball in tangential arguments about other actor's involvement in counter terrorism and the need for special laws.

The police push for special legislation on terrorism. The assertion of the police is that terrorism cannot be dealt with under regular law.¹⁴⁰

As demonstrated in the case of the two TCA's examined in chapters six and seven the Indian Penal Code and Criminal Procedure Code are sufficient to stabilize a terrorist. However the absence of explicit special legislation requires a more skilled choreography. Particularly compared to a more coded assemblage that explicitly inscribes some of the choreography between legal assemblage and security assemblage into special laws. This increased difficulty leads to the claim that the IPC, the CrPC and the Indian Evidence Act are not enough to deal with such offences.¹⁴¹ Calls for special legislation are

persistent. Even though there is recognition amongst high ranking members of the police that special laws are often draconian. The special powers given to the police are an absolute necessity if the problem of terrorism is to be addressed.¹⁴² There is thus a group of

actors constantly calling for more special laws. Hand in hand with this call for more special legislation goes a critique of the regular laws.

Very often this critique leads with the argument that the IPC is flawed because it is based on English law.¹⁴³ The problem with this is

not merely one of origin, but of two presumptions enshrined in the law. Firstly, witnesses are principally presumed to be honest, and secondly, a crime is seen as locally contained. According to one argument I heard this is incorrect, because firstly, witnesses in India are under fear and compulsion, and secondly, terrorism networks encompass large areas.¹⁴⁴ That these preconditions of regular laws are

not met puts a lot of stress on the investigating organs and this pressure leads to problems. The police feel put between a rock and a hard place. On the one hand they are tasked with protecting the

¹⁴⁰ Interview XIX, Fieldwork I.

¹⁴¹ Interview XIX, Fieldwork I.

¹⁴² Interview XIX, Fieldwork I.

¹⁴³ Interview XIX, Fieldwork I.

¹⁴⁴ Interview XIX, Fieldwork I.

country, and on the other hand, the very pieces of legislation under which they are given the powers to do so, are frayed with distrust towards them. This mistrust of the police enshrined for example in safeguards on the admissibility of statements made by police officers, plus the lack of actual police accountability, is also blamed by some on the British legacy in India.¹⁴⁵ According to this account the structures of police corruption were set during the Raj in order to facilitate imperial domination and ensure pliability of one of the most useful organs of local control. This desire created a fissure in the relations between the courts, the magistrates, the prosecution and the police.¹⁴⁶ There is a sense among high-ranking police officers that the magistrates are not aware of the difficulty of investigations, that they do not necessarily listen to the evidence brought to them, and that they look at possibilities rather than probabilities.¹⁴⁷ According to this argument moving away from regular laws and towards special legislation is the remedy to this situation.

Despite these critiques regular laws are always used as the benchmark to compare special legislation to. They are also used in many cases and have by far the largest network of precedent to build upon. In contrast stand the special laws that are more dedicated and have a smaller caseload to back them up.

5.3.1.2 Special Laws

Like general laws, special laws are both intermediaries and mediators. The main special laws that I encountered in my interviews were the Terrorist and Disruptive Activities (Prevention) Act, the Armed Forces Special Powers Act and the Prevention of Terrorism Act. They are routinely referred to by their acronyms: TADA, AFSPA and POTA. The Unlawful Activities Prevention Act (UAPA) also plays a role but bridges the gap between a special law and a general law as it is neither specific to an area, like AFSPA, nor is it temporary, like TADA and POTA. Special laws play a role as intermediaries in the

¹⁴⁵ Interview XIX, Fieldwork I.

¹⁴⁶ Interview XIX, Fieldwork I.

¹⁴⁷ Interview XIX, Fieldwork I.

tense relationships between actors, arguments about them are shot back and forth. They also play a role as mediators transforming the relations in the TCA both when they are explicitly invoked and as we will see in chapter seven when they are not invoked but still form a backdrop, in both cases the *vinculum* created articulates the event in a way that ties in with the special law.

Special laws are divisive. Some consider them the only remedy to the heinous acts of terrorism and the weaknesses of the general laws identified above, whereas others consider them dangerous. The opponents of special laws argue that they are dangerous, because they make the judges feel special by virtue of sitting on a special court. Moreover, at the same time, they curtail the judges' powers and freedom of discretion through both a legal framework and a narrative from which it is difficult to escape.¹⁴⁸ The harshness of special laws often does not stem from their text, but rather from their application in an environment which makes it seem as if society as a whole were under threat.¹⁴⁹ This results in commonality being drawn between cases and a sense that these are people who have struck out at society as a whole. The ensuing aura of the case leads to an increased likelihood of severe interpretation of statutes. Ordinarily the Special Court is not different from any other court in its composure. However, through the focus on these particular types of cases there is a toughening in attitude as a consequence of the surrounding narrative.¹⁵⁰ As we will see in the case study, this impact brought up by my interview partners for cases of terrorism under special laws also plays a role when no special law is applicable but the case becomes understood as terrorism.

The law may actually in theory work counter to this tendency, by including safeguards and limits on its own extraordinary nature. In the case of POTA for example, there are clear guidelines for the interception of electronic communications. This gives capable defence lawyers something to work with. The problem arises when

¹⁴⁸ Interview XXII, Fieldwork I.

¹⁴⁹ Interview XVII, Fieldwork I.

¹⁵⁰ Interview XVII, Fieldwork I.

the judicial discretion, primed by the aura of national security, is applied in a fashion that is detrimental to the rights of the accused and sets adverse incentives for the resolving of the actual case. In the parliament attack case that we have encountered (Section 2.7) before, the defence of advocate Ms Ramakrishnan was in large part based on the inadmissibility of the intercepts, since the procedure laid out in POTA was not followed. However the judge dismissed this because POTA was not invoked on the day of the actual attack. Effectively, this led to a situation where the judge chose to apply certain tough parts of a special law, but refused to consider the safeguards applicable to the case at hand.¹⁵¹ While this is based on a lawyer's account of the occurrences, the judge tells a different story.¹⁵² In the story of the judge, the routine length of these trials is the primary concern. Shortening it to achieve a verdict within weeks rather than years is a proud achievement.¹⁵³ Ever the skilled navigator and choreographer, the Judges' first priority is to keep the show on the road. The subordination of procedural safeguards to judicial discretion is a part of an attempt to do justice both to the case at hand and to a wider perceived threat scenario.

Therefore we encounter a situation where it is the process rather than the procedure that becomes punitive. This plays out for example in the extension of detention periods under special legislation. In POTA, the period of detention can be doubled with the permission of a magistrate who is satisfied themselves that the police require this time for their investigation. In practice, magistrates wave this through without looking at evidence.¹⁵⁴ This feeds into the perception amongst defending lawyers that the working relationship between the investigating organs results in the magistrates implicitly trusting the prosecutor's office. This is as much a real tension as it is a

¹⁵¹ Interview XVII, Fieldwork I.

¹⁵² As mentioned in the chapter on Method, my participant observation was in the chambers of Ms Ramakrishnan resulting in countless discussions and conversations on the matter.

¹⁵³ Interview XXVIII, Fieldwork I.

¹⁵⁴ Interview XVII, Fieldwork I.

perceptual problem, because even if the allegations are untrue, the lack of transparency that allows them to fester and persist is perceived as damaging to the legal system and the rule of law. As one of my interview partners pointed out, “it is this process which chips at the law as a whole.”¹⁵⁵ This process can be destructive. Continuous applications of discretion that generally point in the same direction tend to dilute the entire procedural law over time, facilitating the introduction of shortcuts. This is amplified through the mechanism of precedent, if it happens at the High Courts as we will see in the case study of the Calcutta blasts. Drawing on various precedents from the Parliament attack case Supreme Court Judgment the High Court solidifies exceptions. This becomes even more pervasive through the sheer number of Sessions Court judgments that the higher courts ultimately become unable to overrule because of efficiency and non-interference reasons. And even if these cases are then overruled at higher levels much of the damage has been done. Under TADA approximately 77000 people were arrested as terrorists, of these only 725 or 0.81% were found guilty as charged. (Rahman Undated) Nevertheless, the other 99.19% underwent the harrowing process experienced by so many ‘undertrials’ in India.¹⁵⁶ They effectively undergo punishment. According to both literature and interview partners, part of the process aims at the punitive element of the undertrial experience.

There is of course another side to this story. There is a risk to demanding absolute certainty in criminal proceedings. Taking this risk at the lower courts may be too high a standard from a public utility point of view, it is argued by other interview partners. It is clear that with the abysmal conditions and capabilities of the Indian Police Service, particularly in many of the populous northern states, the demand of answering all open questions before issuing a conviction would lead to even lower conviction rates, and the releasing of many

¹⁵⁵ Interview XVII, Fieldwork I.

¹⁵⁶ For a quick breakdown and analysis of Undertrials in India see: (Tiwary 2015; Raghavan 2015; National Crime Report Bureau 2013).

possibly guilty individuals. They would have to be released because of the gaps in the legal chain of reference produced by an ill-trained and ill-staffed police. Despite arguments that what truly produces a deterring effect are the integrity of the investigating process, and the infallibility of the legal system in bringing the guilty to account. This seems to be highly impracticable in the current situation due to the shortcomings of the police.¹⁵⁷ However, heeding Kennedy's warning, it is clear that the process of adjudication is not only limited by the quality of its inputs (D. Kennedy 1997). The role of the police in putting a stamp on these trials is at least twofold. On the one hand, there is the direct influence through the evidence they bring to the table, the framing of the issues as being of a particular nature, which is done in conjunction with the prosecutor. Creating at a first instance the vincula between insignificant incidents and the existing body of texts. On the other hand, and while more subtle perhaps even more far reaching, is the influence the police have by virtue of their own incapacities in forcing a constant relaxation of the rules of procedural justice for the sake of the process. The passage of law ceases to be deliberate, slow, hesitant and marked by detours but rather privileges passage over law. In other words, the rules of procedure have to be hollowed from the inside in order to maintain process. Shortcuts supplant laborious detours in order to arrive at the destination. Process is achieved at the expense of procedure. This is because the way in which the legal system is set up presupposes a modern, capable police force, which is capable of producing highly reliable forensic findings and operates within the mode of the passage of law. In the absence of police capabilities to produce evidence that is stabilizing by virtue of its quality and integrity, the rules of procedure have to be relaxed in order to arrive at stabilization. This results in the TCA encompassing a complex choreography, in which actors use discretion to fill gaps in the chain of reference in order to maintain the capacity of the assemblage to articulate. When the choreography fails and the territorialisations between legal assemblage and security

¹⁵⁷ Interview IV, Fieldwork I.

assemblage crystalize into a hard border, we can see traces of this failure. Encounters which are the extrajudicial killing, by the police and other security organs proliferate. This is an obvious sign of TCA failure as actors walk away, and the TCA is unable to make a terrorist speak. Yet failure is not inevitable even at this stage, we will see in the Nasir TCA (chapter 6) how evidence collected during an encounter can be seamlessly worked into the working assemblage even while the Judge sidesteps ruling on the legality of the shootings that led to the evidence. Passage is prioritised over law.

These fundamental problems in the investigating organs lead to many flawed investigations. The result is dissonance between procedure and process. The blueprint of the law, coding the legal assemblage, and the operation of the police meant to provide actants and traces to be fed into the workings of that assemblage are at loggerheads. The imminent needs produced by the security assemblage put a huge strain on the coherence of the TCA. It is the record of the trial whose main function becomes to balance and integrate these actants to keep the TCA working more or less smoothly. This includes the formation of black boxes where the inner workings of some translations becomes suppressed so as to make a shortcut invisible behind a shortcut.

The police together with the prosecution are required to produce a narrative in which the events can be plausibly linked to people in custody. This story needs to be plausible to all parties. Therefore, it has to fit into the pre-existing narrative(s).¹⁵⁸ However there is an overwhelming sense that the police are not very good at forensic investigations. This in turn leads to a large number of unsolved cases, or cases in which a conviction is impossible due to the relatively weak evidence produced.¹⁵⁹ This can be countered through improving the capacities of the police or through lowering the threshold for evidence, special laws allow to lower the bar in cases which are perceived as touching upon national security while maintaining the

¹⁵⁸ Interview X, Fieldwork I.

¹⁵⁹ Interview X, Fieldwork I.

aspiration of improvement in the police force. In such a scenario detours enshrined in law become replaced with equally inscribed shortcuts, but the chain of reference required to articulate the terrorist remains described in abstract by the body of laws.

Some of these arguments transcend the separation between mediator and intermediary. Despite the absence of truly reliable statistics conviction rates under special laws such as TADA, POTA and UAPA are tremendously low.¹⁶⁰ While this is not in itself a problem, it becomes one when the lack of successful prosecutions is paired with the impossibility of receiving bail under these laws. If we assume that accused who have been tried and found innocent are indeed innocent in the vast majority of cases. They would, despite their innocence, have spent on average the better part of a decade behind bars, simply because trials are so lengthy. This poses a severe problem for the legitimacy of the legal system as a discoverer of truth. However if we understand the TCA as an assemblage that has as its purpose the articulation of terrorist truths, their fabrication and stabilisation, then the punitive aspect of lengthy trials adds to the severity of the fact rather than to detract from the legitimacy of the process.

5.3.2 Legislative and Politicians

The Indian legislative is a part of the process that blurs the line between regular and special law, process and procedure, and actors as intermediaries and as mediators. Part of this contribution is the creating of an exceptional structure of overlapping laws. These laws then create a body of texts which through its internal plurality allows the a wider range of vincula to be possible. This increases the scope of the individual actor working on a particular micro stabilisation. It therefore both increases the complexity of the TCA and adds a layer of political legislative activity to the considerations the actors make when making sense of their perspective on the assemblage. Many come to the conclusion that fresh laws are made for old problems on a fairly regular basis, suggesting an introduction of new laws as

¹⁶⁰ Interview IV, Fieldwork I.

intermediaries. This has led some to argue that “laws are used as a sop thrown to the people to show parliamentary activity: Look here we have done something.”¹⁶¹ The flurry of new laws over recent decades, and particularly the repealing of POTA just to reintroduce it a few weeks later in the form of the amendment to UAPA, is a case in point. On the legislative level there is a sense that duplication is much easier than implementation.¹⁶² Arguably making laws is one of the ways in which parliament can show that they are doing something and taking terrorism seriously. It is also something that is much more easily done than to address the fundamental problems at their root. It is often argued that Special Laws are really a legislative problem rather than a judicial one.¹⁶³ In this sense, it would be parliament, and the ruling elites who are to blame for making a mess of the judicial system.⁸³ As such the creation of new laws is meant to provide cover for the legislation’s crossing of formerly held limits (Mate and Naseemullah 2010). In this sense the borders of what is legally permissible for the state are pushed out further and further with each new law.¹⁶⁴ We can understand this as relative de-territorialisation of held legal norms and re-territorialisation of these actants within a security assemblage. The pressures on the legislative following attacks should not be underestimated (Kux 2009). In the aftermath of the 2001 attack on the Indian parliament, an observer described the political climate as being so heated that any dissent and opposition against the introduction of POTA was depicted as almost treasonous.¹⁶⁵ Nevertheless, a joint sitting of parliament was required in order to pass the bill into law.¹⁶⁶

However, there is a certain risk with this, as it draws parliament into an interaction with the terrorists. In other words the special status of

¹⁶¹ Interview V, Fieldwork I.

¹⁶² Interview V, Fieldwork I.

¹⁶³ Interview XXIX, Fieldwork I.

¹⁶⁴ Interview XXIX, Fieldwork I.

¹⁶⁵ Interview IV, Fieldwork I, but the heated climate is also discussed in (Mukherji 2005).

¹⁶⁶ Joint sittings are extremely rare and are evidence of the high-pressure environment and the remaining opposition to the proposed bill.

terrorism, inscribed in law, works as a double edged sword, as according to one interview there is at least some risk that this special status attracts new terrorists by setting them apart from ordinary criminals.¹⁶⁷ Clearly, while this is a risk, it is one that should not be overestimated in the legislative dimension. In other words, the hype that makes terrorist strategies viable from the terrorist perspective is predominantly one in civil society, pushed by the media and subscribed to by the middle classes rather than spurred by parliamentary activity. While it is likely that parliament feels compelled to jump on the bandwagon of outrage, by drafting a new law in response to an incident, it is unlikely that this new law is spearheading popular attention to the crime.

Internal political trends are also reflected in the various pushes for new legislation, or to repeal existing ones. When TADA was allowed to lapse in the 1990s, the home ministry was ready with a new draft, and according to my sources, was pushing for it all throughout the decade.¹⁶⁸ Only in 2001 the cataclysmic events taking place gave the impetus for new legislation to be passed. While POTA has been repealed since, over the past decade the legislature has allowed all kinds of amendments to existing laws at the behest of the state and the security organs. This has caused the existing law, UAPA, to be very harsh. For example since its 2012 amendment a person is defined both naturally and inclusively of judicial persons. Drastically expanding the scope of entities capable of committing terrorism. Additionally the period for which an organization can be banned before review has been extended to up to five years. On top of this, and most worryingly, the legislature repeatedly puts the onus of safeguarding and checking measures under the act on the same institution that is the most active user of its provisions, the home ministry. And despite all of India's variety in its political spectrum, it is important to keep in mind the great continuity displayed in security laws (Fischer 2004).

¹⁶⁷ Interview V, Fieldwork I.

¹⁶⁸ Interview VII, Fieldwork I.

There is a destabilization and deterritorialisation, melting together legislative and policy-making activity in the passing of special legislations. On the one hand, the laws are considered to be part of the criminal justice system. On the other hand, their role is much more complex as it becomes part of a signalling endeavour of the policy making process. The new law acts as an intermediary to convey the message to the public that parliament takes an issue seriously and is acting against it. This duality of function is at the heart of the misnomer that is in the title of these laws. Laws of the criminal justice system are very rarely aimed at preventing something, but rather to punish some entity after the act.¹⁶⁹ In other words, the role of the criminal justice system is reactive.¹⁷⁰ According to one interview, the titles of the acts, which usually stress prevention, are confusing, as the law is not at the heart of prevention of terrorism. After all, terrorism is not a law and order issue in the first instance.¹⁷¹ Rather, according to many, prevention of terrorism needs to be dealt with from a position of integrated policy, including a legal dimension, a developmental dimension, an economic dimension, education and democratization, as well as ultimately a security driven approach (Giri 2009).

5.3.3 The Prosecution

The prosecution is an ambiguous actor. They have a dual role within the TCA. On the one hand, their role is the representation of the state's and victim's interest in court. On the other hand, in practice, they often seem to play an advisory role to the police. It is particularly this latter role that is often problematic. In this function, at face value legal advice on how to frame a charge sheet and how to handle evidence could be very beneficial. This is essentially expertise on how to create vincula and how to contribute to the crafting of a stable

¹⁶⁹ Interview XXII, Fieldwork I.

¹⁷⁰ There is a debate dating back to at least the XIX century on the relation between crime, punishment and deterrence for an overview see. (Chiricos and Waldo 1970)

¹⁷¹ Interview XXII, Fieldwork I.

chain of reference. However, if some interview partners speculate that this advice extends to comments on the usefulness of additional evidence and how the law could be skirted to achieve a conviction. It seems clear from my interviews and the observations I made in court, that in many ways the police and the prosecution are almost synonymous in relation to their interests when the matter at stake is a high profile case. Both the police and the prosecution desire to achieve a conviction as well as recognition for their role in the case. In India there is an on going debate surrounding prosecutorial autonomy.¹⁷² Some argue that the police are really in charge as all prosecutors are politically appointed.¹⁷³ Yet autonomy seems to be a desirable outcome as since 1973 efforts have been made for the prosecution to become established as autonomous from the government. But this has not happened and prosecutors continue to change with the tenure of government. This causes an additional problem. If the prosecution is an agent of the state, it is there to ensure a conviction, rather than to, as most idealistic accounts of prosecutorial authorities suggest, to ensure a fair trial and to work towards giving the judge full knowledge of the facts.¹⁷⁴ This inbuilt ambivalence of one of the key actors increases the likelihood of a tipping of the TCA, to become territorialised more along the lines of security than law and order.

5.3.4 The Police

The police are one of the most important actors of the TCA. The police structure is somewhat opaque to the outside. However, my interviews enabled me to piece together at least a sense for the route that an event takes place as it becomes registered and taken up by the police. Most importantly for the initial translations of the TCA, each First Information Report (FIR) has to be checked by a senior officer before going to court, where the magistrate checks it again.¹⁷⁵ Within

¹⁷² Interview XXXI, Fieldwork I.

¹⁷³ Interview XXXI, Fieldwork I.

¹⁷⁴ Interview XXXI, Fieldwork I.

¹⁷⁵ An FIR is a document, usually initiated by a civilian and has to be recorded and signed by the person

24 hours of investigation, a senior officer has to decide if the ingredients of the crime are present, at which time a case file is opened or the FIR is tabled. The police are organized in circles. Each circle has at least one senior police officer. Two to three circles are then grouped together into one subdivision, which is headed by an assistant superintendent of police. Subdivisions are grouped together to form one district, which is headed by a superintendent of police. While theoretically FIRs need to make their way up this hierarchy immediately this is a slow process in practice.¹⁷⁶ For most serious crimes, there is also an inspector who is in charge of the investigation, and thus by extension responsible for monitoring the adding or removing of charges. The review of the process of investigation at the district level takes place in a weekly review. For grave crimes, it is usual that the Assistant Superintendent of Police (the head of the subdivision) is personally responsible to investigate immediately, this ASP would also be in charge of guiding the investigation and making and keeping the first case diary. The combination of cellular divisions between circles and a strict hierarchy that is not routinely observed in practice introduces added tensions into the TCA. These tensions however are nearly invisible at the court stage on which we will focus in the case studies. By the time the TCA produces a judgment the various tensions within the police and the investigation have been completely edited out of the account. So while the focus of this inquiry is on the making of terrorists in courts, legitimate questions arise to the role of the investigation in already engaging in stabilization. Additional pressures to the already highlighted tensions in the police apparatus exacerbate the heterogeneity of the investigative process.

Some of my interview partners pointed to the vicious circle of police corruption, which ensures that officers cannot reach a high position without making a substantial bribe to the ones appointing them, and therefore are forced from an economic point of view to recover that

making it, it alerts the police to the occurrence of a crime).

¹⁷⁶ Interview XIX, Fieldwork I.

money during their time in the post. The second problem with the police is that they are undertrained, understaffed and under equipped to deal with something like terrorism. According to my interview partners from the elite side of the security forces, the police are scared of terrorism because they do not know what to do with it.¹⁷⁷ Not only are the police scared of terrorism and terrorists, but also, according to this interview, there is no money to be made with terrorism. In other words, while the police can extort bribes and make money during criminal investigations, terrorism requires genuine work and because of the severity of the issue does not offer itself to making money.¹⁷⁸ Without an economic motive, there is nothing or very little to extort.

This is contradicted by another interview in which my interview partner asserted that the police are able to use draconian special laws to extort money from people. Some go even so far as to claim a nexus between police, crime and politicians. This takes shape when the police have to bribe a politician to get the appointment, thus needing to make good on their investment while on the job.¹⁷⁹ While of course these are only allegations, they are sufficiently widespread to require at least a mention. Whether or not it is true that some elements of the police are out there to make money, the general population perceives it as true.¹⁸⁰ The sense that terrorism laws are being used by ruthless police officers to extort maximum kickbacks is a widespread point of view. Additionally, one that would be supported by the findings of previously mentioned studies on TADA.¹⁸¹

¹⁷⁷ Interview XXX, Fieldwork I.

¹⁷⁸ Interview XXX, Fieldwork I.

¹⁷⁹ Interview XI, Fieldwork I.

¹⁸⁰ For example a plethora of Bollywood movies portrays the police as corrupt and bent on extorting money whenever possible.

¹⁸¹ For discussions of TADA see for example (Kannabiran 2004)

Police harassment is made possible by tough counter terror laws.¹⁸² There are occasional references in my interviews to police informers, who would not be called to court as witnesses in order to protect their identity, but whose testimony to the officers plays a large part in shaping the narrative proposed by the police and in guiding their investigation.¹⁸³ It would seem that this is a widespread practice of all investigating agencies around the world¹⁸⁴, and thus not necessary to note upon more here, except perhaps that in light of the frequent inadequacies, implausibility and other irregularities in the investigations, the role of these informers has to be called into question. Especially the acceptance in court of the account which the officer develops on the basis of anonymous informants should be considered carefully.

A further issue with the police is that, according to insider sources, there are strong attempts within the police to avoid complicated cases in their jurisdiction. Some have allegedly gone so far as to physically move bodies across the border of their jurisdiction into the next precinct. This ties into the tensions between regional politics and law and order policy. Regional disparities, state differences and a lack of uniformity in laws and procedures lead to a strongly heterogeneous picture of the police.¹⁸⁵ Additionally, this creates problems for issues that require trans-border co-operation. The difficulties witnessed first hand during the ethnographic observations of the court in the 2008 Delhi Blast case are apparently not isolated incidents, but rather a regular phenomenon when states with different governments are required to work together on a case.¹⁸⁶ This is the same in cases of attempted centralisation, such as the National Counter Terrorism

¹⁸² Interview XII, Fieldwork I.

¹⁸³ Interview XIV, Fieldwork I.

¹⁸⁴ This is reflected in laws which allow the calling of anonymous witnesses, see for example the Crown Prosecution Service website. www.cps.gov.uk.

¹⁸⁵ Interview XIX, Fieldwork I.

¹⁸⁶ In this case which we already encountered in the introduction it was the then BJP government of Gujarat that refused to cooperate with the then Central Congress Government in Delhi.

Centre, where because of states' opposition to having this power at the centre, nothing is happening.¹⁸⁷

Finally, while in many of the cases we have looked at the police seems to be this ominous organisation in the background, they are far from uniform. This is an important and often overlooked aspect in understanding the police in India.¹⁸⁸ Between individual officers and between precincts/states, the police are afflicted with competition, rivalries, promotions, popularity, professionalism and all kinds of other areas of conflict, which is barely contained beneath the surface.¹⁸⁹ Further exacerbating this pressure the security organs of the state often suffer heavy casualties from engagements with the more organised insurgent groups that are generally also grouped into the terrorism bracket. While there is a certain recognition in the police force, including special units, that operational failure leads to these casualties, a part of the blame is also put on the public and the media for being sensation hungry and unwilling to support decisive action against people seen by the police as obvious culprits.¹⁹⁰ This leads to half hearted rescue missions as the disastrous initial attempt during the 2011 Mumbai Hostage Crisis. Allegations of planting of weapons on innocents after killing them, the frequency with which already extremely rare forensic reports turn up police ammunition used to kill civilians, are all dismissed as part of a sensation hungry media. According to high-ranking police officers, Maoists obviously use the same weapons as the police, because they either steal them or buy them on the black market.¹⁹¹

In addition to these reapportioning of responsibility the interest in playing the procedure by the police is defended as something necessary in anticipating the court, as otherwise the Indian Evidence Act is so complicated that it would become impossible to prove a

¹⁸⁷ Interview XIX, Fieldwork I.

¹⁸⁸ Interview XXXI, Fieldwork I.

¹⁸⁹ Interview XXXI, Fieldwork I.

¹⁹⁰ Interview XIX, Fieldwork I.

¹⁹¹ Interview XIX, Fieldwork I.

case.¹⁹² In addition, there is the practical difficulty that the courts are overworked. But it would be mistaken to allow the thousands of cases pending to evoke a sense of homogenous slowness. Rather the courts can be very fast in some cases while others languish on adjournments in the hope that the judge changes.¹⁹³ In addition the police raises the legitimate issue of security in the courtroom. While there have been no noteworthy incidents since the 1980's, the threat to judges sitting on terror cases is real, and shapes procedure.¹⁹⁴ This links back to the temporal and spatial scope of the invoked hinterlands of any specific case.

However there is also a different way of making sense of these irregularities. In interviews with police officers, some raised a number of anecdotes of cases in which terrorism was suspected at first. In these anecdotes, the charges that were on a false basis were simply amended and replaced by the more appropriate charges. The use of special laws, in order to gain a momentary tactical advantage, such as increased custody, decreased likelihood of bail, or simply a show of force, are understood to be part of the tricks of the trade, something every police officer is aware of and creative use of these techniques is applauded.¹⁹⁵ Whether the incident in question is an attack on a police station, or the assassination of an MP, there is a recognition that the temptation is there to use these laws in an abusive fashion.¹⁹⁶ Additionally, there is a potential for police to hurry their investigations, because they know that if they file the charge sheet within 90 days, then bail will not be granted.

In many ways it is the role of the police and investigating organs to stabilise a series of events into something significant. Therefore, while much of the focus is on the courts, the police play an equally important role in the TCA's articulation of the terrorist as their labours are essential to the chain of reference. However as the case

¹⁹² Interview XIX, Fieldwork I.

¹⁹³ Interview XIX, Fieldwork I.

¹⁹⁴ Interview XIX, Fieldwork I.

¹⁹⁵ Interview XIX, Fieldwork I.

¹⁹⁶ Interview XIX, Fieldwork I.

percolates up the courts the police's role becomes increasingly suppressed. The dividing line between evidence and irrelevancies serves to make the police work involved in crafting the facts of the case invisible. Failed stabilisations fall by the wayside as irrelevancies whereas those where the vincula hold fast become evidence are treated as interpretable legal facts. The police therefore plays a crucial role in the early stabilisations of the terrorist through determining the scope of the terrorist facts that are then made to speak for themselves in the course of the TCA, but a role that in the same course is made increasingly invisible.

5.3.5 Judges and Magistrates

It is perhaps no wonder that judicial discretion operates differently from one court to the next. Yet, interview partners identified a tendency for the lower courts to exercise their discretion in ways that favour the police.¹⁹⁷ As we have seen above this could be a side product of the visibility of the police at lower courts and their increasingly diminishing presence as their work cumulates in the established and accepted body of evidence. Pro-police commentators are however often vocal in their warnings against the tendency to make the police the scapegoat for any public failings including those in regard to terrorism (Balachandran Undated). Officers who are highly decorated for their successes in tackling terrorism in public have a reputation voiced behind raised hands, of being torturers and killers.¹⁹⁸ In the courts this open secret is usually dealt with discretion, bordering on deliberate silence (Ramakrishnan 2013). But while the courts almost never explicitly address the issues of police corruption and police violence, there are clear signs every now and then that the court is aware and attempts to move procedure around the pitfalls of relying on clearly tainted evidence. For instance, according to one reading of the parliament attack case, the Supreme Court's reluctance to rely on the confession by Afsal Guru was partially due to the open secret of the main investigator's reputation

¹⁹⁷ Interview XXII, Fieldwork I.

¹⁹⁸ Interview IV, Fieldwork I.

for being highly unorthodox in his methods of investigation.¹⁹⁹ While the Court did not openly rely on the confessions, which were marred by the usual procedural lacunae,²⁰⁰ it nevertheless took cognizance of the confession and relied on the recoveries that were allegedly made as a direct result of the confession. These recoveries included explosives and weapons as well as computers and phones. Additionally Afsal Guru was allegedly able to identify the deceased attackers at the morgue. All these were things that the court relied upon, despite what many commentators see as clear signs of police tutelage of witnesses and even Afsal Guru himself.²⁰¹ Arguably the decision to uphold the judgment despite these irregularities and unanswered questions is also a political decision. This is because, according to many, it was a necessary symbol of deterrence to have somebody sentenced to death over the parliament attack case (Roy 2006).

The courts have powers at all stages of the investigation. This includes the power to ask for progress reports or even to direct the investigation.²⁰² Like we have seen for the police above the courts are also organised in sets of relations which have a bearing on their ability to articulate freely. From the side of the courts each district is headed by an executive head of the district, who is of the rank of a magistrate, but predominantly has administrative functions and technically also heads the police. This is not always the case in practice.²⁰³ Additionally, each district has a chief judicial magistrate, who, on paper, is entirely independent and reports directly to a designated High Court Judge.²⁰⁴ However, in practice, high-ranking members of the police are aware of the importance of keeping a good personal relationship with the chief judicial magistrate, and the deep interdependence between the police and the magistrate. In the words

¹⁹⁹ Interview IV, Fieldwork I.

²⁰⁰ Afsal Guru remained in police custody even after the legally mandated transferal to judicial custody.

²⁰¹ Interview IV, Fieldwork I.

²⁰² Interview XIX, Fieldwork I.

²⁰³ Interview XIX, Fieldwork I.

²⁰⁴ Interview XIX, Fieldwork I.

of a high ranking police official: “if the police is on good terms with the sessions judge, the court might be persuaded to be pro police, if not, not.”²⁰⁵ This relationship is particularly important in instances involving discretion, for example the decision to grant or deny bail. From the perspective of the police many courts are overly distrustful of the police. This may be due to people being coached by the police and then on the stand realizing that they cannot go through with it. This may also be a matter of bribes or threats.²⁰⁶ As pointed out to me by a police officer, a witness making a written statement and then deviating from it in court commits perjury in his opinion. In the face of witnesses turning hostile all the time and statements being admitted entirely at the discretion of judges, meaning they can be rejected or accepted at what to police looks like a whim, the job of the police is rendered increasingly difficult. This is in addition to the above-discussed difficulties of resources, training and political pressures. Whether the discretion of the judges and magistrates plays out in practice as something which favours the security assemblage or the legal assemblage is unpredictable (Shankar 2009, 13).

5.3.6 Spaces and Locations

There is a spatial dimension to the tensions between the actants above. These differences are tied in with the locations of both the incident and the courts. The TCA brings together actants that are far flung but there is always an inscription and/or a translation involved in making an actant travel. So the role of distance should not be underestimated in the background of the TCA. This distance expresses itself particularly between the metropolitan centres such as Delhi and the periphery. The travels required for actants from one court to the next, but also for many of the actants in the TCA to the court in the first instance create a new dimension for tensions and translations. Another example of such travels is that of laws, which are applicable in one part of India and are then transported either to the whole union or to another state.

²⁰⁵ Interview XIX, Fieldwork I.

²⁰⁶ Interview XIX, Fieldwork I.

One example of a law that was brought from the periphery to the centre is TADA. First designed to tackle the Punjab insurgency in the 1980's it was later brought to bear on all of India.²⁰⁷ Another example where this is being attempted is the case of the Maharashtra Control of Organised Crime Act; a stringent law that according to many has been useful in tackling both terrorism and organised crime in Maharashtra. This law is the object of envy for legislators in Gujarat who want to have their own version of it (K. Gupta 2006; Nanjappa 2015). Yet, for various reasons the central government has prevented this from happening for a while now. This draws our attention to yet another complicating factor, the role that rivalries between institutions or in this case states play in shaping some of these tensions (Boland-Crewe and Lea 2004). One of the concerns I encountered in my interviews was that laws that begin as peripheral phenomena, i.e. something to be used in far away disturbed areas, begin being applied closer and closer to the centre, until eventually the fear is that they strike at the heart of the vocal communities in the metropolis as well.²⁰⁸

Another difference between the periphery and the centre is the audience of a trial and its effect on the judge. According to some of my interviews, judges, prosecutors but especially defence counsel may not be as aware of the law in the provinces as in the central metropolises.²⁰⁹ The most important difference is that in an adversarial legal culture the quality of the defence, at the sessions court stage already sets the scope for the remainder of the trial, and failure to challenge something there may pose a problem later. This is not true as much in respect of challenging material facts or legal reasoning, but evidence which is not challenged immediately upon its entry into the system, will be very difficult to be disregarded later, and although there are notable exceptions, it is not the rule that such a challenge will be successful later on. Further, because of a negotiated

²⁰⁷ Interview IV, Fieldwork I.

²⁰⁸ Interview IX, Fieldwork I.

²⁰⁹ Interview X, Fieldwork I.

character of the court record, it is possible that failure of the defence attorney to supervise very closely what is being recorded and potentially to amend it right on the spot, will lead to artefacts in the records, which either fail to show some particular incident, or include certain words in a witness testimony which were not there.²¹⁰ It has been my observation during fieldwork, that the most competent lawyers paid close attention to the work of the typist and included regular amends to their work, whenever uncertainties were there for reasons of understanding, language or carelessness. Finally it was an integral part of an astute and diligent lawyer's routine, particularly in contentious cases, to leave one person behind to check that the record was not tampered with at the end of proceedings, before being taken into the court archive till trial resumed. The quality and truthfulness of the records is something that has to be treated with a certain amount of scepticism. The fact that the record does not reflect everything spoken in the courtroom during the day, as a record would for example in a UK court, reinforces it as a translation. It has been my observation during participant observation, that between the courts, and depending on the seniority, competence and skilfulness of the defending advocates the record would more or less accurately reflect what happened on the day. That these records then travel without the context of their inscription causes space to play a significant role in editing out specificities and instabilities.

Then there is the difficulty of law and order being a state subject. The balance of power between the centre and the periphery is distorted with coalition governments.²¹¹ When there is a coalition government at the centre, but perhaps several strong state governments who also have the backing of a strong minority at the centre, this makes things much more difficult. At the end of the day, the states, as the implementing organs of central directives also always have the ability to drag their feet as a measure of last resort. These complexities and complications are partially responsible for the intensely mixed picture

²¹⁰ During my participant observation at the Saket Court, I observed instances of this happening.

²¹¹ Interview XII, Fieldwork I.

that counter terrorism in India always portrays. There have been some attempts at solving some of these tensions through the implementation of the National Investigations Agency Act which is meant to concentrate the power of counter terrorism investigations which this new agency under the control of the centre, however this has yet to show substantial results as six years after its enactment there still are no finished cases to show for the agency's work.

After having encountered the tensions in play between centre and periphery in courts and in governments it should come as no surprise that there also are tensions involving the police. During my interviews I have come across high praises for the investigative capabilities of the CBI. While there are some allegations of being directed by the government, people generally concur that the CBI is doing a relatively good job in the investigations that they are undertaking. It is said that the CBI has more focus, as it can focus solely on investigations, and does not have the requirements of every day policing to contend with. On the other hand there are also allegations that CBI only picks cases they know they will win, this in combination with CBI being located at the centre, and potentially overtaking the jurisdiction of state police forces, just to leave those with the cases which are deemed unsolvable does create friction.²¹²

Nevertheless from the legal angle, it is quite interesting to see how CBI operates in contrast to the state police forces, as they have legal advisors integrated at all levels of the investigation. This dispersion of legal expertise to the lower echelons of investigations, is partially responsible for a much more effective operation style, with investigations which yield a high chance of successful prosecution due to the following of procedural safeguards. It is however important to note, and quite interesting, that despite this close working relationship between the forensic investigators and the legal advisors at the CBI, there are regularly problems of admissibility with CBI procured evidence as well. Suggesting that on one hand it is impossible to ensure absolute admissibility while working in the field,

²¹² Interview XIX, Fieldwork I.

and on the other that the investigating organs know that they will be given some slack in respect of procedure, when in court.

It is no surprise that the situation in the periphery is much worse than at the centre, although we have to understand the two as slightly different phenomena. While what is generally considered terrorism takes place both at the centre and in the periphery, it makes more sense to understand what is happening in the periphery through the lens of an insurgency in many parts of the country. It is clear that the reaction of the security organs and of the state is much more severe in the periphery.²¹³ The frequency of encounter killings, including of women and children who are then designated as militants is shocking and the role of the security organs is generally predatory. In addition, the access to justice in more remote areas is very limited, with judges and magistrates who frequently are unwilling to stand up to the security organs, or even share their views on the adivasi population.²¹⁴ While there are some moves from NGO's to counter this situation, the access is very limited and people are struggling to get their voices heard.

Part of the functioning of the TCA is to mediate local, regional and global dimensions that come together in making the terrorist speak. In other words the articulated terrorist is stabilised locally through a chain of reference that draws on local, regional and global actants. The terrorist facts which are made to speak for themselves through the TCA are then again carry the local, regional and global dimensions. While we can pinpoint locations within the TCA the spaces that play a role are complex and do not map easily onto the locations where the terrorist facts are crafted.

5.3.7 Messiness and the Anomaly of Smoothness

The above accounts have only covered what came out in my interviews and the picture is rich and confusing. The contradictions, tensions and many angles that we encountered stand in stark contrast to the smooth narrative that stabilizes the terrorist in the TCA and

²¹³ Interview XXIII, Fieldwork I.

²¹⁴ Interview XXIII, Fieldwork I.

makes the terrorist facts speak. Yet the specific court is the location where these stabilizations are crafted and the TCA brings together aspects of all the above encountered actants. Even the most vigorous critics of the special counter terrorism laws do not question the legitimacy of the rule of law and the legal system as a whole. The three main critiques I encountered in my interviews do not call for a dismantling of the whole legal system. Many actors criticize incidents of incompetence or corruption of individual actors (Ahuja and Ganguly 2007). Others criticize the special laws (UAPA, POTA, TADA, AFSPA etc.) as not being in line with ideals of the rule of law. And thirdly there is a critique of the practices in the courts, which does not necessarily relate to incompetence or corruption, but rather to a systemic dependence of judges. In this context the ambivalent role played by problematic institutions, like the prosecution, the investigating organs and the political executive, moves to the foreground. In combination these three critiques could be highly destabilizing, but they are rarely levelled in unison. Rather many actors focused on one of them, while suggesting reforms, changes and other improvements to the legal system in order to address them. This transforms the critiques into productive tensions within a wider legal assemblage. The TCA then consists of tensions, such as these critiques, circulating along conflict points and delineating the field itself. Therefore, while these critiques play an important role in articulating some of the tensions found in the TCA, they are also part of the choreographed circulations, which give rise to a notion of legal field as picked up by the actors. Since in this section my focus is on the tense relationship, as described by the actors themselves, between the specific TCA and the wider legal assemblage and security assemblage. Part of the stability of the terrorist emerging out of the TCA is the choreography that encompasses actors who would see themselves as part of the law and order approaches to terrorism and actors who recognize themselves as security oriented. Influenced by the judge the choreography, the coming together of these actors, leads to high degrees of tension

within and surrounding the TCA putting strain on the chain of reference and individual vincula, but at the same time allows the terrorist to emerge relatively stably out of the TCA. Yet it is important to differentiate between the product of the TCA and its outcome as something ‘discoverable’. To use the words of one of my interview partners: “This [the messy picture] is all only the tip of the iceberg. There are doxa around the law, of context, outrage, escapism, inherent communities, distrust, partial well meaning human rights, courts overstepping, and the resilience of the system. But be careful of absolute innocence or guilt, the question of actual guilt is usually beyond us.”²¹⁵ This comment illustrates the role of trust and faith in procedure. The courts and the rule of law rely on this faith to continue the establishment of legal facts. This is tied in not only with the procedural guidelines but also with the underlying necessity of faith in a system, which has as its declared purpose the discovery/production of social facts.

5.4 From the Hinterlands to the TCA – Section Conclusion

In this chapter I have presented articulations of the perspectives my interview partners took on the TCA. While no one actor has complete overview of the assemblage within which they operate the plurality of viewpoints and heterogeneity of speculations as to the modalities of associations observed contributes to our appreciation of the complexity of the successful TCA. Making the terrorist speak, the articulation of terrorist facts, is the core function of the TCA, but understanding the above perspectives allows us to better understand how the choreography between shortcuts and detours plays out. Throughout my interview partners have maintained the court as a place of central importance for the playing out of tensions between actants. It is through the court that pre-existing security assemblage and pre-existing legal assemblage encounter and interact. It is in the courts that process and procedure are being balanced. Even the encounter killings of suspected terrorists are understood as extra-judicial, and in reference to the procedure of the courts. The

²¹⁵ Interview XVII, Fieldwork I.

choreography of the TCA and the terrorist stabilisation include modalities of associations that draw on both the slow, deliberate and hesitant passage of law and a swift, risk management oriented, short cut prone logic of security. In the two case studies in the next chapters we can see how vincula are crafted in practice and the gaps in the chain of reference edited out as the judgment percolates up the courts. Ultimately the terrorist facts speak for themselves, making the bulk of their production and articulation through the TCA inaudible. In order to reach this point we encountered both the well known passage of law and gaps in the chain of reference which actors have speculated about from their respective perspectives.

Chapter 6 – Case Study I / Nasir and the Choreography of Terror

6.1 Chapter Introduction

There is nothing essential about terrorists, but neither is it correct to say that one man's terrorist is another man's freedom fighter. In fact most terrorists are terrorists for most of the people most of the time. But they are so, not out of some essential terrorist characteristic, rather as a product of a terrorist stabilising machine. In this case we are going to look at one aspect of this machine, the terror court assemblage. More specifically, the TCA under examination here is that in relation to which Nasir becomes terrorist. Nasir becomes terrorist, but this is neither an act of mere labelling nor is it the discovery of some hidden attribute that makes him, and has always made him, terrorist. A lot of work goes into stabilising the category of terrorism around a particular person and this is by no means an inevitable process. The careful crafting of vincula builds into the chain of reference which permits the TCA to articulate terrorist facts. As such, the work of the TCA remains contingent and precarious. But tying it to pre-existing hinterlands, such as the pre-existing legal assemblage and the pre-existing security assemblage significantly increases the likelihood of lasting stabilisation. At the same time this stabilisation requires a number of translation processes. These translations articulate terrorism and narrow the plausible range of relations between the actants of the assemblage by crafting (legal) vincula into the chain of reference. Without ever opening their mouth Nasir and his co-accused are made to speak, they are articulated as terrorist, through the chain of reference crafted into the heart of the judgment. These terrorist facts pass through trials of the familiar passage of laws, laborious and detoured, but they also follow the shortcuts and prehensions of the modality of security assemblage. Following Bruno Latour's advice to ANT, I want to avoid taking as my job "to stabilize the social on behalf of the people it studies; such a duty is to be left entirely to the 'actors themselves'"

(Latour 2007, 30). In this chapter I will follow the traces of actants in the Nasir TCA, to highlight how the chain of reference is stabilised and the terrorist fact made to speak for itself. This enterprise raises one unavoidable double question. What are the actants and who are the actors?²¹⁶ It would be tempting to deal with this as a preliminary question, one where a set of actants are predetermined and then followed through the study. However, this would pose the risk of missing out on some interesting actants that only emerge as the inquiry progresses. The TCA comes into existence in non-chronological and incoherent patches. These patches of relations become increasingly choreographed and their actants increasingly enrolled in the choreography of the TCA. But it is only in the completion of the judgment that a smooth, coherent and chronological narrative emerges in which all actors are firmly enrolled. Throughout the chapter I use the judgment as a starting point. However since I then follow actants that weave in and out of the judgment, each patch of stabilisation is in fluid interaction with all the others. From the starting point of the judgment I then need to work backwards through the details of traces. This shows the processes of enrolment, stabilisation and sanitisation through which the chain of reference is stabilised and the terrorist is articulated. What is commonly treated as inputs: evidence, the terrorist, laws, are actually products of the specific TCA that flow into the chain of reference and are tied together by vincula. The judgment works as an inscription of this chain of reference but also as a transportable mediator between the specific TCA and other assemblages.

This chapter then shows the actants that are drawn together in the tension surrounding definitions of terrorism and group delineation. This tension is evident in this case study; at the Sessions Court, High Court and Supreme Court different actants come together and cast the delineation in an increasingly restrictive sense. The initial

²¹⁶ As a brief reminder, I use actant as the overall category including all entities with the capacity to interact, whereas I use actors for the subcategory of human actants.

translations that actants undergo as part of the incident becoming a TCA are crucial. As the TCA churns on these tense, initial translations are increasingly supplanted by the inscribed judgment. This then acts as a mediator between Courts. Now let us turn our attention first to these initial translations and how they create circulations amongst actants.

6.2 The Divide and How to Clear up a Mess

The first case study illustrates how Nasir the terrorist is stabilised and articulated in court through the crafting of a chain of reference. For our inquiry the case of Nasir is particularly interesting because he, and the six others, are accused not of terrorism but of a conspiracy to wage war against the state and of killing with a prohibited weapon.²¹⁷ Despite the law in application not being explicitly anti terrorism legislation, the case has terrorism written all over it.²¹⁸ The lawyers I interviewed refer to it as a terrorism case. The judges at all levels occasionally refer to the accused as terrorist. The media certainly picked up on the case as one of terrorism (Bhattacharya 2002). This case shows that rather than to obsess with the definition of terrorism, we can understand it as a way of choreographing actants so that the terrorist emerges. The TCA enacts this choreography and importantly does not rely on terrorism to be defined in the law books. The terrorist is made to speak its own terrorist facts, articulated through the chain of reference which is carefully crafted and stabilised in the

²¹⁷ In this chapter I draw on a set of cases and documents that I have either seen during my participant observation or that are publicly accessible relating to Nasir they are: FIR No. 19 of the 22.01.2002 / General Diary Entry 1889 at Shakespeare Sarani Police Station (Calcutta); Sessions Case No. 79 of 2002 (City Sessions Court at Calcutta); Death Reference Case No. 2 of 2005, Criminal Appeal Nos 247 of 2005, 377 of 2005, 425 of 2005 and 428 of 2005 all filed with the Calcutta High Court; Md. Jamiludin Nasir Vs State of West Bengal, CrI.A. Nos. 1240-1241 of 2010.

²¹⁸ The American State Department list it as a significant incident of terrorism on their list under the same name. <http://2001-2009.state.gov/r/pa/ho/pubs/fs/5902.htm>.

TCA. To show how this terrorist is assembled I follow three components that make far-reaching connections and the judgment. Each of these components is made up of one or more actants in the assemblage. The first section looks at the actant AK47, the second at two motor vehicles and their garage, the third follows a few emails and a letter, the fourth section follows the path of the judgment. These four components are in tension with a number of other actants in the TCA, for example the most evident tension is between the components and the laws applied. These tensions are choreographed so that Nasir the terrorist emerges. Terrorism thus emerges out of this TCA despite no law or definition of terrorism being explicitly involved. The terrorist is being performed, made to act, made to speak and articulated in a legal setting without the legal blueprint so many people argue is required.

The case of Nasir shows that in some cases actants from a law assemblage (procedural law, lawyers, judges, courts, substantive law, etc.) enter into tensions with a pre-existing security assemblage and fall into a choreography of terror. The resulting assemblage performs terrorism and stabilises some of its actants in relations of terrorism. This gives rise to three insights: firstly, the quest for a definition of terrorism is a project with a distinct political agenda; secondly, the debate between security and law in respect of counter-terrorism misses the point about terrorist becoming; Thirdly, terrorism is enacted and (re-)performed through assembled chains of references for example through a TCA. Terrorism comes with and emerges out of its own choreography the strong tensions of which ripple through the entire assemblage. The invocation of terrorism results in a partial crystallisation of erstwhile fluid relations. This crystallisation is also contingent and precarious but gains increasing stability through the crafting of a chain of reference and its inscription. Nonetheless by drawing on the pre-existing security assemblage, it comes with its own force that curtails the realm of plausible interactions between actants in the TCA. As part of the inscription actants are enrolled in a story that is itself precarious but becomes more and more stable as

the TCA operates. In starting with the judgment we encounter this story at its strongest, after it has been inscribed already, I will start with an overview of the case before going about destabilising it through showing the contradictions and processes of stabilisation that go into it. This allows us to zoom in on the crafting of the chain of reference that makes the terrorist speak.

6.2.1 The Story of the Case

The Nasir Case is first and foremost a working arrangement that articulates Nasir as Terrorist. As such it does things rather than is things however we need to know a little bit more of what it is all about. The telling of this story of the case relies on what the actors I spoke to consider as the story of the case. This is not to say that numerous instances are not problematic to some of the actors for a variety of reasons. This story is at the very heart of what is embattled between the prosecution and the defence. It is also the only sequential, coherent narrative of the events surrounding the 22nd of January 2002 that emerges out of the TCA, it is the finished chain of reference which makes possible the articulation of terrorist facts. It is *the* story after it has been stabilised and in it the terrorist facts are made to speak for themselves. This narrative is an actant in its own right. It is so for two reasons. First it interacts with other actants. The affects of the narrative latch onto other actants in the Nasir TCA. The underlying chain of reference has a co-constitutive tension with the judgment. The judgment makes sense because of the chain of reference but the terrorist fact is ultimately stabilised by the judgment. It is the fabric of the chain that makes the incident a terrorist conspiracy. At the same time it is the judgment that sanctions the fact and imbues the chain of reference with official legitimacy. I will return to the relationship between the chain of reference and the judgment in the section on the judgment below. For now one simple caveat will suffice. The working relations in the assemblage are fluid. Part of what this chapter aims to illustrate is how some conceptual actants, such as terrorism, exert tensions which ripple through the entire assemblage territorialising, stabilising and

ultimately crystallising parts of the assemblage. By looking at the finished chain of reference we start from the product and work our way backwards. Additionally this reflects how the actors I worked with introduced me to the Nasir Assemblage during my participant observations.

The story of the Nasir TCA starts in the early morning on 22nd January 2002 in Calcutta. From there the Nasir TCA radiates backwards and forwards in time connecting people, objects, histories, laws, countries, God, Courts through a myriad vincula in a choreographed assemblage that puts Nasir at its heart and makes him the terrorist; an assemblage that is sustained not least through the countless hours of work that have gone into performing it, including the time it takes me to write this and you to read it. All these work hours help to make, define, stabilise and articulate the assemblage. It is only in the process of relations between actants that the Nasir TCA emerges. Yet none of it would have happened without the events of the early morning hours on Tuesday the 22nd of January 2002. Sticking with the metaphor of the chain of reference, we need a first segment. It all starts with two persons operating three machines.

6.2.2 The Nasir TCA Becoming

So far the Nasir TCA is still non-existent, although it will reach back to this moment in the future and translate it (e.g. one of the two people on the motorbike is translated/reconstituted as Nasir the terrorist). But for now there are only two people operating three machines. This is important because even the latent TCA has the capability to naturalise its own processes. In other words, it is all too easy to, as most standard accounts do, slip into essentialist accounts in which the persons operating the machines *are* terrorist. In such an essentialist account the products of the TCA become its inputs and the work that goes into stabilising them becomes invisible. The carefully crafted chain of reference becomes a seemingly autonomous fact that speaks for itself. However, this inquiry is about how terrorist facts are made; how the latent TCA operates to become a Nasir TCA and produces stable terrorists whose stories speak for themselves.

The two men riding that motorcycle and shooting those guns are not at that time essentially stable terrorists and this is by no means a moral argument in their defence. As stabilised products of the TCA the terrorist cannot be terrorist before the TCA has become active. This is therefore solely about the sequence with which terrorism emerges as a result of the working of a TCA. An example to illustrate this point comes from Bruno Latour who drew much puzzlement and criticism for claiming that Ramses II had not in fact died of tuberculosis (Daston 2000). The crux of this claim is not to dispute that scientists working on the mummy of Ramses II may not have discovered tuberculosis. Rather that since the medical assemblage necessary to speak of tuberculosis only came into existence 3000 years after the incident we would succumb to a fallacy in claiming that he died of it. This may seem like hair-splitting, but in the case of terrorism it is indeed highly relevant hair-splitting as other incidents may not emerge out of the assemblage as terrorist. Returning to the story of the Nasir TCA, and the events that lie at its heart.

6.2.3 The Incident

At around 06:15 A.M. two people on a motorcycle drive up to the American Centre in Calcutta and open fire on the group of police officers gathered there for shift change. The driver uses a pistol whereas the pillion rider is operating an AK 47 (Kalashnikov) machine gun. The shooters open fire killing five and injuring fifteen, and then drive off southwards. At 06:36 the Calcutta Police Control Room at Lal Bazar receives information pertaining to a shooting outside of the American Centre and immediately dispatches personnel from the Shakespeare Sarani Police Station to the American Centre. Upon their arrival the 20 shot individuals (2 civilians and 18 police officers) are taken to S.S.K.M Hospital, where five succumbed to their injuries, the two civilians and 12 police officers were treated and discharged while one was retained for more treatment.

6.2.4 The Investigation

The investigation starts and simultaneously translations are taking place. Someone at the Shakespeare Sarani Police Station records the First Information Report (FIR) No. 19 and makes an entry into the General Diary (entry No. 1889) in response to a complainant named as Shri Barun Kumar Saha. The FIR and the General Diary entry are timed and dated, both indicating that they were written at 06:36 A.M. on the 22nd of January 2002 and pertaining to an incident that took place at 06:30 A.M. on the same day. The fuzzy time window of the incident is translated into a precise time for the purposes of the rapidly forming TCA. Latent structures of the legal assemblage are creating the first vincula between insignificant events and a body of texts.

Another step in the direction of assembling the TCA is the translation of the incident above into legal categories. This crafting of an initial set of vincula remains extraordinarily powerful throughout the TCA and in many ways crafts a scaffolding for the chain of reference on which the terrorist articulation hangs. The FIR is for offences under Sections 121, 121A, 122, 120B, 302, 333, 427 and 21 of the Indian Penal Code (IPC) 1860 as well as Sections 25(1B)(a) and 27 of the Arms Act 1959. I will return to these laws in greater detail in Sub-Section 6.2.5. The incident is broken down and translated into the coded relations of the pre-existing legal assemblage. Returning to the investigation, which is placed under the leadership of Mr Anil Kar. Mr Kar also plays a role later on to testify as prosecution witness (P.W.) no. 123. Him and his assistant, Mr Sujit Mitra (P.W. 122) interrogated the injured police officers, collected cartridges from the scene and spoke to the back up forces from the Shakespeare Sarani Police Station. Beginning the amassment of a store of materials, which become tied into the chain of reference as significant through the crafting of a vinculum or can be returned to the realm of insignificant artefacts later on. From there the investigation stalled for five to six days. The TCA however is beginning to assemble around a series of translations.

6.2.5 Initial Translations – Laws and Legal Categories

6.2.5.1 *Making two things that are not the same equivalent*

Recalling from Chapter 2, “translation is the process or the work of making two things that are not the same, equivalent” (John Law and Hassard 1999, 8). In the subsection above we observed a crucial, initial translation. Through the framing of charges the incident was translated into the pre-existing legal assemblage, little bonds between insignificant events and a body of texts were created. There are three questions we need to address in this regard: Firstly, what is the product of translation? Secondly, what takes place during the process of translation? Thirdly where does terrorism come in?

Making the incident outside the American Centre and FIR No. 19 equivalent is a translation, it creates a vinculum between the event and a text. This translation breaks down the overlapping but multiple realities of the incident²¹⁹ into relatively smooth, transportable legal categories, i.e. specific texts describing crimes under specific laws. All across India Section 27 of the Arms Act covers prohibited weapons. It is understandable to a lawyer, it can be transported but only if a vinculum can be crafted to tie the text to the event. For us it is necessary to go through these categories one by one. The primary reason for this is that once the vincula hold fast the legal categories become used as shorthand for their content in both the judgment and the interviews. The translation therefore creates a new set of actants that stand in tension with the incident, tandems of events and texts tied together with a vinculum, a third set of actants that articulate the incident. The tension arising between the incident and the legal event introduces a looping effect between the incident and the pre-existing categories that it is translated into. These looping effects are amplified as the translations take place from court to court. No new

²¹⁹ After all the reality of one of the shooters is likely to be somewhat different from that of one of the people shot, which again would be different from that of Mr. Kar the lead investigator. Even among the Police Officers being shot at there are quite substantial differences in the accounts of events.

vincula are introduced, but the tandems which are part of the chain of reference become refined and retranslated. The following three subsections outline three blocks of vincula that play an important part in the chain of reference. Largely presented in the form of traditional legal analysis these sections set the scene for the articulation of the terrorist providing the frame of reference within which the terrorist fact can be made to speak for itself.

6.2.5.2 Waging War, Conspiracy, Murder and the Indian Penal Code

Following the order listed in the framing of charges the first section we encounter is 121 Indian Penal Code²²⁰ (IPC). This section goes to the heart of the TCA. 121 reads:

Waging, or attempting to wage war,
or abetting waging of war, against
the Government of India. –
Whoever, wages war against the
Government of India, or attempts
to wage such war, or abets the
waging of such war, shall be
punished with death, or
imprisonment for life and shall also
be liable to fine.

The provision of 121 IPC above has been amended three times. The first time by Act 16 of 1921 which substituted “fine” for “and shall forfeit all his property”. The second time by A.O. 1950 which substituted “Government of India” for “Queen” and the last time by Act 26 of 1955 which substituted “imprisonment for life” for “transportation for life” (Universal’s Criminal Manual 2013, 440). All

²²⁰ 45 of 1860.

of the IPC has a long history but shows interaction between the hinterlands of pre-existing security and legal assemblages.²²¹ The translation that makes the incident at the American Centre equivalent with 121 IPC, also ties it into an assemblage that has been in tension since before 1860. The hinterland of this assemblage today is vast and beyond the scope of this inquiry. However, this hinterland is also directly relevant to the unfolding of the Nasir TCA. This translation ties the working of the assemblage to a network of other Court assemblages; a point that holds true for all aspects of the TCA. Each of the sections below has been interpreted and reinforced through court assemblages and their judgments. Judgments that continue to play a role as precedent. But in order to tie in with specific precedents the translation of incident into coded categories must be complete.

121A IPC is closely related to 121 and reads

121A. Conspiracy to commit offences punishable by section 121.

– Whoever within or without India conspires to commit any of the offences punishable by section 121, or conspires to overawe, by means of criminal force or the show of criminal force, the Central Government or any State Government, shall be punished with imprisonment for life, or with imprisonment of either description

²²¹ For an excellent discussion of the use of terrorist fictions in British India see Morton in (Boehmer and Morton 2009).

which may extend to ten years, and shall also be liable to fine.

Explanation. – To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof.

The section has undergone very similar sets of amendments as 121 IPC, largely aimed at making it work for the newly independent Indian state. For the TCA this section and the section below on the punishment for conspiracy are of great importance. The legal mechanism of conspiracy facilitates a specific type of connections between various actants. Through the legal machine of conspiracy actors can be tied together making a subsequent stabilisation easier since evidence against one can be used against all.

122 IPC still relates to the waging of war and reads

122. Collecting arms, etc., with intention of waging war against the Government of India. – Whoever collects men, arms or ammunition or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against the Government of India, shall be punished with imprisonment for life or imprisonment of either description

for a term not exceeding ten years,
and shall also be liable to fine.

120B IPC is of pivotal value for the sentencing of the case. It relates to the punishment of conspiracy and is read both in conjunction with the sections from the IPC and those from the Arms Act we will encounter below. It reads

120B. Punishment of criminal conspiracy.- (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.

Conspiracy is further clarified in the case law, tying it even more firmly into a pre-existing assemblage. These clarifications are both general and specific to the Nasir TCA. Previous judgments specifying elements of conspiracy are found in the judgment, which we will turn to below. The general ones relate to the definition of Common Intention. One case is referenced where the Supreme Court held that the one condition for the application of conspiracy was the establishment that the acts be committed “in furtherance of common intention.”²²² 120B is further qualified by the necessity to establish an agreement between the parties to commit an offence. This means that mere association or relation is not enough to establish the intention.²²³ The case law further recognises that while it is necessary to establish the agreement, this is difficult and therefore gives a nod towards the use of indirect evidence.²²⁴

We can make most sense of this network of tensions by linking it to the assemblage as a working arrangement described by Ian Buchanan (Buchanan 2015). The interplay between various loosely scripted ways of interacting and networks of association between actants is what turns it into a desiring machine or a working arrangement. The desiring machine is a machine that interacts with actants it comes in contact with. But it is neither individual agency nor structural forces that have primacy. This latter point is particularly important as many accounts of terrorism in court fail to take it into account. In other words, the functioning of the law in stabilising Nasir as terrorist is by no means a rigid path dependent on following of a prescribed structure. Neither is the judge a free agent, able to categorise in an unfettered manner as she pleases. Rather what we observe is a complex enactment, or choreography, of the tensions between heterogeneous actants, contextualised by the momentum of a number of hinterlands. Hinterlands are in this case territorialised most

²²² Chandra Kant v. State of Madhya Pradesh, AIR 1999 SC 1557.

²²³ Sanjiv Kumar v. State of Himachal Pradesh, AIR 1999 SC 782: 1999 (1) JT 716.

²²⁴ Vijayan v. State of Kerala, 1999 (3) SCC 54: AIR 1999 SC 1086.

strongly by the pre-existing security assemblage and the pre-existing legal assemblage. The enactment takes the form of a relatively familiar scene such as the courtroom, the discussion of evidence and/or the deployment of stylised arguments in the form of precedent. The tensions between actants become visible in the way in which actants are unpredictably integrated into the assemblage. Yet, the hinterlands make themselves felt in the way in which patterns of associations are more likely than others. The pre-existing legal assemblage and the pre-existing security assemblage influence what associations of actants are plausible in the TCA.

In this case one of the hinterlands we could unearth is the way in which the IPC was conceived by the British as part of Crown Rule in British India. The way in which the sections under discussion here were particularly used to quell dissent and the independence struggle has been sanitized by the amendments following the one in 1950. The laws we are discussing here are an important part of the assemblage precisely because their blueprint is loose. If their codifying effect were too strong the assemblage would turn into what DeLanda calls a Strata, a strictly hierarchical and almost calcified assemblage (DeLanda 2006). But since even the law recognises room for the application of mind, other influences and tensions also arise in the assemblage. We will return to this discussion in the concluding section. For now it is enough to recognise that the loose blueprint provided by the sections, stands in tension with the hinterlands of precedent and that the initial translation of the incident which we are examining here, puts these actants into relations.

Another element of the assemblage is section 302 IPC relating to murder. Not surprisingly it is a very short provision with a long history. It reads

302. Punishment for murder. –

Whoever commits murder shall be

punished with death, or

imprisonment for life, and shall also
be liable to fine.

We can focus on two aspects that make murder interesting in relation to terrorist stabilisation. Firstly, the case law provided in the criminal manual for elucidation of murder includes a hierarchy between truth claims. Secondly, it also has a provision for extreme cases. The court is the final authority on truth, for example in relation to medical evidence:

“Mere variance of prosecution story
with the medical evidence, in all
cases, should not lead to conclusion
inevitably to reject the prosecution
story. Court to make out efforts
within judicial sphere to know
truth” ²²⁵ (Universal’s Criminal
Manual 2013, 514).

The court is the authority of truth within the judicial sphere. Therefore it can decide between the expert evidence and the prosecution story. To reformulate this for the purposes of our investigation, the tension between two actants, the medical report and the prosecution story, can be choreographed for the purposes of judgment and ‘truth’ by the court.

Extreme cases are considered the ‘rarest of rare cases’. In Indian law the death penalty should only be implemented when the case qualifies as rarest of rare. We are therefore looking at those murder cases that fit the description rarest of rare in the explanation of when the death penalty should be imposed. The comment first recognises that all

²²⁵ Mohan Singh v. State of Madhya Pradesh, AIR 1999 SC 883; 1999 (2) SCC 428.

murder cases involve brutality.²²⁶ But that that brutality in itself is not sufficient to make them stand out as the rarest of rare. The death penalty should not be imposed in every murder case. Then the comment turns to two cases to illustrate incidents of the rarest of rare cases. Both cases it turns to are cases that are also spoken about as incidents of terrorism. The first is the assassination of Indira Gandhi by her bodyguards.²²⁷ The second illustration is that of the assassination of her son Rajiv Gandhi by the LTTE.²²⁸ In addition to brutality there is something worse about these cases, which makes them even more heinous than murder alone. That the rarest of rare formulation is a constellation which is already coded for in murder makes the choreographing of the terrorist more easily accessible even through the murder route.

Just as the rarest of rare case above section 333 IPC relates to attacking civil servants and makes the initial crime more severe. It reads

333. Voluntarily causing grievous hurt to deter public servant from his duty. – Whoever voluntarily causes grievous hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of

²²⁶ Subhash Ramkumar Bina @ Vakil v. State of Maharashtra, AIR 2003 SC 269.

²²⁷ Kehar Singh v. Delhi Administration, AIR 1988 SC 1883.

²²⁸ State of Tamil Nadu through Superintendent of Police CBI/SIT v. Nalani, AIR 1999 (5) SC 2640.

anything done or attempted to shall
be punished with imprisonment of
either description for a term which
may extend to ten years, and shall
also be liable to fine.

The sections related to attacking the state violently are completed with Section 333. The translations between the incident and the pre-coded legal categories (vincula) have begun the choreography of the terrorist. However they have also opened connective spaces to tie in another set of actors. These actors are stabilised as terrorist at the Sessions Court, even if the High Court picks apart this stabilisation, it has been stable for a period.

6.2.5.3 The Printer Group

The legal sections found in the footnote relate to the so called 'printer group' which produced fake documents. According to the main narrative the printer group supported the core group by providing them with fake documents. There are no attempts to stabilise them as involved in violent crime, but through the legal machine of conspiracy we have encountered above they are initially stabilised as terrorist.²²⁹ The printer group is loosely associated with

²²⁹ As such these sections relating to them read
467. Forgery of valuable security, will, etc. – whoever forges a document which purports to be a valuable security or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest or dividends thereon, or to receive or deliver any money, movable property, or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any movable property or valuable security, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
468 IPC reads

the main conspiracy in the narrative provided by the prosecution. The Sessions Court also sentences them to death. The interplay between the different sections makes the conspiracy extend to all involved and thus requires all involved to be punished with the same severity.

6.2.5.4 The Arms Act

The legal mechanism the Sessions Court uses to dispense death sentences to all accused, and that in conjunction with the conspiracy is aimed at stabilising all accused as terrorists comes from the Arms Act.

25(1B)(a) Arms Act

25. Punishment for certain offences

– Whoever – [...] (1B) (a) acquires,

has in his possession or, carries any,

firearm or ammunition in

contravention of section 3; [...]

shall be punishable with

imprisonment for a term which

shall not be less than one year but

which may extend to three years and

shall also be liable to fine.

468. Forgery for purpose of cheating. – whoever commits forgery, intending that the document or electronic record forged shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

471 IPC finally reads

471. Using as genuine a forged document or electronic record. – Whoever fraudulently or dishonestly uses as genuine any document or electronic record which he knows or has reason to believe to be a forged document or electronic record, shall be punished in the same manner as if he had forged such document or electronic record.

This relatively mild provision contrast starkly with 27(3) Arms Act.

27. Punishment for using arms, etc.

– [...] (3) Whoever uses any prohibited arms or prohibited ammunition or does any act in contravention of section 7 and such use or act results in the death of any other person, shall be punishable with death.

For the purposes of the arms act a prohibited weapon is defined as

2. Definitions and interpretations –

In this Act, unless the context otherwise requires, – [...] (f)

“prohibited arms” means –

(i) firearms so designed or adapted that, if pressure is applied to the trigger missiles continue to be discharged until pressure is removed from the trigger or the magazine containing the missiles is empty.

During the first translation, the weapon used during the incident, AK47, is translated as a prohibited weapon. Since there is an entire section on the AK47 below, we need not go into too much detail here. Suffice it to say that a key provision for both the sessions and the high court is the mandatory death sentence resulting out of 27(3). What happens during the process of translation? We have seen above how the incident is translated into a smooth account that interacts

with the legal assemblage. Translated into legal categories the incident becomes entangled with a much wider network of actants; procedural law, case law, and an entire legal assemblage. As this translation takes place the assemblage becomes increasingly coded. As demonstrated in sub-section 2.4.2 coding “performed by genes or words supplies a second articulation, consolidating the effects of the first [territorialisation] and further stabilising the identity of assemblages” (DeLanda 2006, 15). Therefore, the translation of the incident into legal categories not only makes links to a legal assemblage, it also begins to territorialise the TCA and consolidate it. Such a secondary articulation of the incident permits three things. Namely creating a feedback loop between the category and the accused, making the incident transportable and making it relatable to a network of other incidents.

Firstly, it ensures the use of the legal categories as a looping effect occurs between the secondary articulation and the investigation into the incident. Ian Hacking initially explored his looping effect in relation to categorised people and their interaction with the category of their description (Sperber, Premack, and Premack 1996). He found a feedback loop where people would increasingly conform to their categorisation in a complex interactive social inscription of expected roles. We can however also extend this logic to the way in which actants in the TCA enter into tensions during the investigation stage. Aspects of these tensions that correspond to legal actants are privileged and thus the process of translation transforms actants. The primary articulation ‘AK47 machine’, which releases missiles when the trigger is pressed, is relayed into the secondary articulation ‘legal machine of the prohibited weapon under 27(3) of the Arms Act’, which releases death sentences when proved beyond reasonable doubt. To use Donna Haraway’s term, there is a ‘partial connection’ between the AK47 and 27(3) but one that requires the translation to be maintained (Haraway 1988). This translation takes place during the investigation stage and is self-reinforcing. The investigators are

looking for partial connections and select actants for their suitability to be partially connected.

Secondly, this translation makes the incident transportable. The legal sections allow the incident to be transported from one lawyer to the next and from court to the next but also across time. Thirdly, it ties the incident in, makes it comparable and connects it to the assembled secondary articulations – it becomes comparable to similar cases. As the case proceeds through the courts and becomes increasingly stabilised as terrorism, the secondary articulations increasingly move to suppress the primary incident. In the investigation stage, all manner of materials are sifted through and the prosecution creates a mix and match case out of them. This case supports their narrative and latches onto particular actants, such as the AK 47, the car and the correspondence, to tie together a particular story of the incident. Other elements, such as the CCTV coverage from the American Centre is expressed as a lack. It is mentioned, it is referred to, but no one I spoke to had seen it, the prosecution never physically made it part of the trial assemblage. The CCTV coverage is mentioned to support the prosecution narrative but the tapes are not available for viewing in court (The Hindu 2002). The presence of these CCTV tapes is interesting because they are at the fringes of the assemblage and the other parts of the assemblage are unable to interact with them in the way that one traditionally interacts with CCTV tapes – by watching the footage. They are unwatchable, their content is virtual, but the fact of their existence is actual in the TCA. By their existence they contribute to the stabilisation even though their content remains speculative.

From the investigation stage to the Sessions Court a translation takes place. This translation has various aspects, the ‘officer in-charge’ of the investigation, Kausalya Nand Chowdhury, becomes prosecution witness 113. In his place the prosecutor becomes the chief choreographer up to the judgment stage when the Judge takes over. These translations show not only the transitions between phases, or modes, of the TCA but also the interchangeability of roles and actors.

6.3 The Breakthrough – The Travels of an AK 47 a Dying Declaration

After having stalled for a few days a breakthrough happens in the investigation. The very concept of the breakthrough is of course problematic for our ANT account. It is therefore important to keep in mind that the breakthrough becomes narrated and stabilised as a breakthrough in a post hoc fashion. This is important because it illustrates that the investigation is not a smooth coherent and gradually cumulating process, only once it's story becomes told does it transform into a goal bound trajectory. It is only through the TCA that both the incident and the investigation are tied together as the smooth halves of one whole that speaks for itself. Whereas tracing actants carefully uncovers that the investigation and the incident become together in fits and jerks. We can understand this breakthrough by following two actants, an AK47 assault rifle and an encounter. Before exploring these two actants in detail, it is important to be clear on one preliminary point. While the details of the breakthrough are very murky, its function in the wider case is pivotal. We will return to this murky but functional episode in section 6.3.5 when we look at how the judgments are translated from one court to the next and how some aspects are increasingly suppressed. But for now let us follow the AK 47.

6.3.1 The Kalashnikov

According to many estimates the AK 47 (Kalashnikov) is the most widely available firearm in the world (PYADUSHKIN, HAUG, AND MATVEEVA 2003). The old soviet assault rifle is certainly widely and easily recognised even among laypersons. Due to its wide dissemination in conflicts around the world, but notably not among NATO member countries and their clients, according to Kabbani it is also in popular culture often associated with crime, subversion, terrorism, insurgency and more generally third world conflicts (Kabbani 2013). In our case, the AK47 is the weapon on which the entire case rests. This makes it a crucial actant. These symbolic considerations aside, the underlined fact is that the use of AK47s for

violent purposes remains a daily event around the world and its specific significance needs to be articulated for this case.

As a mass produced commodity one AK 47 is nearly indistinguishable from any other. The only straightforward exceptions are that each AK47 comes with a serial number and factory stamp (Hogg 2000). While those theoretically make each weapon uniquely identifiable, they suffer from three limitations. Firstly and most obviously, one needs to hold the weapon to find the serial number and stamp. Being shot at with one AK47 without then taking possession of that weapon immediately rules out this identification process. Secondly, even if the officers had gained possession of the gun, the serial number can be filed or etched off. Sophisticated forensic laboratories can often reconstitute numbers that have been tampered with. However that takes time and requires a lab with specific capacities. The third problem is that AK47s come in a wide range of qualities. Cheaper models are usually repaired by simple mixing and matching of parts. This means that some parts, if they are well made, can in their working life be part of a number of guns. Not only does that make identification difficult, but we also have to introduce a secondary industry, as AK47s are some of the most often copied and counterfeited firearms on the planet (Isachenkov 2009). Therefore, the serial number is a very unreliable source for identifying a particular AK47. This leaves only the significantly more complicated option, of identification through ballistic analysis. As we saw in section 7.1, bullets and cartridges were found on the scene of the incident. The striations created in a bullet from its high-speed passage through the barrel of a gun allow for the relatively precise determination if a bullet has been fired from a specific gun or not. In order to make this determination, the analyst requires a sufficiently large bullet fragment as well as the firearm in question. If the striations match, it is likely that the bullet was fired from this particular gun. If they do not then it is unlikely. With sufficiently advanced forensic equipment the accuracy is comparable to fingerprint analysis (Castaneda and Snyder 2012). The process is

slightly easier when using casings (Cox 2015). In our case both bullets and bullet casings were recovered from the scene. In combination with the technological assemblage that makes forensic ballistics possible, the preconditions for the identification of the weapon are there. In other words, the AK47 bullets and casings found on the scene could be used to produce the link between the weapon used on the 22nd of January 2002, a person who was found in possession of the gun and Section 27 of the Arms Act as discussed above. That this is possible creates the expectation that in the way that in the course of the passage of law we will embark on a detour to establish one element of the chain of reference as establishing a connection between machine and incident via a series of trials and textual links.

What is most interesting about the link provided by the AK47 is that at first sight there is nothing spectacular about it. For one familiar with the passage of law there is nothing surprising about the causal connection articulated in the assemblage: 1) the weapon used at the incident was a AK47, 2) Bullets and casings were recovered at the scene, 3) The AK47 recovered in Hazaribag is the one used in the shootings, 4) The dying declaration, that is discussed below, connects the accused to the shooting, 5) Therefore both circumstantial evidence and direct evidence of their involvement and shooting is available. These are the connections between actants, which the prosecution successfully attempts to stabilise. These relations between actants form a smooth story. We expect the detour via the ballistic expert and the stabilisation of the two AK47s as the same gun and therefore a stable link in the chain of reference leading to the terrorist fact. The surprise comes in when this stabilisation remains successful despite the ballistic expert opinion indicating that the AK47 recovered in Hazaribag and the bullets and casings found on the scene in Calcutta are not a match. The slow, diligent, hesitant passage of law which detours via a whole body of forensic practices is short circuited in this particular case to arrive at the result the two guns are the same as soon as the detour leads nowhere. By relying on the dying declaration over the expert opinion the court is asserting its

discretion and choreographing contradictory elements, establishing a short cut, which bypasses the (now vexatious) detour we expected as part of the passage of law. The shortcut and choreography that enables it makes the story smooth again, by suppressing contrary pulls. Therefore before we return to our discussion of the AK47, or rather the two AK47s and their role, let us have a look at the dying declaration and the encounter that led to it. This is necessary because the shortcut which permits the AK47 is based on the dying declaration.

6.3.2 The Encounter and the Dying Declaration

On the 29th of January 2002 the Hindu ran a front-page story that on the 28th of January two Pakistanis involved in the Calcutta attack had been killed (The Hindu 2002). The two men are named as Mohammed Zahid, alias Mohammed Idris and Salim.²³⁰ Zahid and Salim died after being shot by police. One report suggests that one of them died on his way to the hospital and the other one at hospital. Whereas a conflicting version indicates they both died on the scene. However both reports suggest that one of the two (Salim or Zahid) made a statement to the effect that he had been involved in the Calcutta Shooting. According to Union Home Secretary Kamal Pande they also admitted to being from the Khanewala District in Multan Pakistan (The Hindu 2002). The links in the chain of reference that articulates terrorist facts tie in the encounter in which both men died with the Calcutta attack and throws in a connection to a district in Pakistan which amongst security personnel has a reputation for being the birthplace of many terrorists. Despite, or perhaps because of, the convenient smoothness of this story scepticism abounds. The details of the shooting that took place in Hazaribagh are already murky. Accounts of the sequence of events differ. Not everyone is convinced that the dying declaration was

²³⁰ Names for suspected militants are always interesting in the media as both a wealth of aliases or the using of one single name result in a degree of indetermination. In this case the journalist uses many aliases for Zahid and only the one name for Salim.

genuine or even that it was necessary for police to swiftly shoot the suspected terrorists (The Economic Times 2002). The account provided by the prosecution and accepted by the Court is as follows:

A.7. Hazaribag

[...]

c) Kausalya Nand Chowdhury (P.W. 113) was the Officer in-charge, Sadar Police Station at Hazaribag. On January 27, 2002 he received an information from S.P., Hazaribag that one police team was coming to Hazaribag from Delhi being led by Mr Rabi Sankar, S.E.P., Delhi Police. They came on a tip off that two terrorists had taken shelter at Hazaribag. On investigation it revealed that the terrorists were staying at the residence of Abdul Mazid Khan at Khirgaon as also at the residence of one Monti at Hasmian Colony. Monty was connected with the terrorists. Two raid parties proceeded, one for Khirgaon and another for Hasmian Colony. On January 27/28 at about 2:40 a.m. they cordoned the house

of Mazid Khan. At 6:45 a.m. S.P. Hazaribag requested the inmates of the house to come out and asked them to surrender before the police. After about half an hour two persons escaped from the side gate and began to fire indiscriminately at the police party. There had been an encounter and ultimately both the miscreants died. One of them (Salim) died on the spot and the other one (Zahid) subsequently died at the hospital. While the injured man was being carried to the hospital he disclosed that he was a member of Lasker-E-Taiba and a resident of Pakistan. He participated in the shootout incident at American Centre along with one Sadakat. One AK-47 rifle was seized from the said injured person who subsequently died at the hospital (sic.)²³¹

It is unclear from the above account what happens at Hasmian Colony except that it implicates Monti, which is relevant for the

²³¹ Nasir High Court Judgment, Paragraph 7.

printer group. During the main shootout in Khirgaon two persons were shot and according to the police at least one of them (Zahid) survived for some time. According to the police the wounded individual, later named as Zahid, made a statement to the effect that he had been one of the shooters in the Calcutta incident. Additionally, A.K. Singh, the North Chotanagpur Range DIG, claimed that Zahid was in possession of the AK47 used in the Calcutta incident (The Hindu 2002). The statement made by Zahid states that he was “a member of Lashkar-E-Taiba and a resident of Pakistan. [And that] He participated in the shootout incident at American Centre along with one Sadakat”(sic) (High Court Judgment, A7 (c)).²³² However, this statement is not brought to court as hearsay, being overheard by the police and subsequently recorded in writing. Rather it is translated into a dying declaration. A dying declaration under Section 32 of the Indian Evidence Act 1872 has evidentiary value.²³³ In the case at hand the court is satisfied that the

²³² Sadakat is a new name, appearing more or less out of no-where and disappears into no-where again.

²³³ The section reads:

32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant. – Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case appears to the Court to be unreasonable, are themselves relevant facts in the following cases: –

(1) when it relates to cause of death. – When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that persons’ death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

[...]

(3) or against interest of maker. – when the statement is against the pecuniary or proprietary interest of the persons making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

statement made by Zahid is a dying declaration and therefore admissible under Section 32 of the Indian Evidence Act. Recorded by Shri Sujit Mitra on the 28th of January 2002, the statement contained information pertaining to the shooting. During the incident at Hazaribag the police also seized the one AK47. Initially thought to be the weapon used in Calcutta, this is then disproved by the expert report, however the court continues to use it as a material link between the two shootings. The dying declaration ties Zahid to Pakistan and to Lashkar-e-Taiba. The seized AK47 was transported to Calcutta by the police team for further examination. The chain of reference, which articulates the terrorist facts and makes Nasir be terrorist is marked by these aborted detours and suppressed shortcuts.

We can see how the network of actants surrounding the Nasir TCA thickens. The investigation is no longer reported as stalled and vincula have been made. These links connect geographical locations, Hazaribagh and Calcutta. They also connect one of the ephemeral shooters of the Calcutta incident with the dead body named as Zahid. The other with the name Sadakat, who according to the dying declaration is the second shooter in Calcutta. The two AK47's, one recovered at the raid and other one that provided the casings found on the scene in Calcutta, have been linked by their common appearance and by the ambiguity whether or not they are the same one. The inexplicable brutality of the incident in Calcutta has begun to make sense by being linked to LeT and Pakistan and thus to the hinterland of state sponsored terrorism (The Hindu 2002). Slowly the assailants are taking shape. Even though we do not know very much about the second shooter, except his alleged name Sadakat, linking him to Lashkar-e-Taiba begins to stabilise the narrative with a hinterland from the pre-existing security assemblage. This stabilisation seems peripheral in the judgment but is an essential part of the narrative about the incident. It is the slow crafting of the chain of reference which will ultimately articulate Nasir as terrorist and make the terrorist facts speak for themselves.

The investigation continues to unfold, using the landlord Abdul Mazid Khan mentioned in the excerpt from the judgment above as the link that ties Salim and Zahid in with the Nasir TCA. It also ties another set of persons to the incident at the Calcutta American Centre. There is a twofold connection between Monti and the Nasir TCA. On the one hand, Monti was included in the tip off that Delhi police received about the terrorist cell in Hazaribag. On the other hand, Abdul Mazid Khan is also Monti's landlord. Abdul Mazid makes a deposition but does not come to court himself. His deposition is the link between the actants in the next two sections. According to the deposition, Abdul Mazid lets one flat to Nasir. To that flat the deposition ties a Maruti Zen car and a motorbike, as well as a chocolate coloured jacket that the police seize from the said flat. Finally Abdul Mazid's deposition also talks about a specific email address.

Starting from the two shootings, one in Calcutta and one in Hazaribag, we have seen how the network of actants has rapidly expanded. We have encountered actants ranging from the AK47 to the words of Zahid and the processes of translation that render one as a prohibited weapon and the other as a dying declaration. Through the interplay of translations, hinterlands and actants, the Nasir TCA emerges and categories of terrorist are stabilised. Even though we have only scratched the surface of the working arrangement that is the Nasir TCA, the amount of work gone into stabilising the terrorist becomes evident. Every link of the chain of reference needs to be crafted carefully to allow the judgment to make the facts speak for themselves and to articulate the terrorist. While each link may include seeming lacunae, shortcuts and detours the chain itself needs to stay strong.

Furthermore, while we need to have one eye out for visible actants, it is important not to allow those we cannot see to drop out of our minds. The tip off Delhi police received to make them look in Hazaribag and cordon off these specific houses is not discussed anywhere in the Nasir TCA. This hints at the existence of a security

assemblage, which has points of connection with the TCA but remains largely invisible. The shortcut which led the chain of reference to jump from Calcutta to Hazaribagh is not one of the slow and deliberate passage of law. In the final judgment the chain link AK47, dying declaration and the Hazaribagh encounter dissimulate their own becoming in order to bridge the unexpected shortcuts we encountered in each one of them. What remains visible are actants such as car, the motorbike and the jacket, they leave traces we can follow.

6.3.3 The Connection - A Car, A Motorbike and a Garage

Following the shooting in Hazaribag the investigation is said to accelerate and even take off. A number of arrests are made within a few days and material objects play a crucial part in linking these individuals, vincula proliferate. Most prominent amongst them are a car and a motorbike as well as the flat/garage where they are kept. The arrests begin with that of Nasir on January 29th 2002. Nasir's arrest is followed by that of Adil and Monti on February 6th, Bobby and Hasrat on March 6th, Aftab on March 22nd and Rohit on April 6th. These dates are taken from the judgment, but some open questions remain. For example, an article by the MRT (an American newspaper) cites Indian officials as having arrested and charged three Bangladeshis and three Indians on the 23rd of January 2002 (Banerjee 2002). This illustrates that Indian officials are convinced that there is a foreign element in the attacks, even if it remains unclear whether it originates from Bangladesh or Pakistan.

The uncertainties and contradictions only arise out of comparing sources that are not linked to the main productive processes. Within the judgment as the trace left from the main thrust of the TCA these contradictions have largely been ironed out, edited out or suppressed. One smooth and strong chain of reference serves to make the terrorist speak. It is not possible at this stage to determine whether the reporter just got it wrong or misunderstood something. Any number of other reasons could have contributed to these contradictions. The most interesting aspect of this is that when only

reading the judgment and the court record incongruences regarding the dates of arrest or provenance of the accused do not appear. Looking only at the official court records it appears that the arrests took place on the above-mentioned dates and that the flat/garage, the Maruti car and the motorbike were the links used to make the connections. There were two flats that played a role in connecting people, the first one is the one raided in Hazaribag and the other in Tilzala²³⁴. The first one was owned by Abdul Mazid, and was rented to Nasir since some time in either November or December 2001. It was at this flat that Abdul Mazid once encountered Monti, Zahid and Salim. Abdul Mazid, who was not called to the stand but recorded a deposition with the police, identified the latter two post-mortem. He further said that Monti had told him that Adil would also come to stay and that Zahid and Salim were employees of Nasir. Abdul Mazid further mentioned a Maruti Zen car, motorcycle and the email address to which we will return below. Finally when presented with the Chocolate coloured jacket the police seized from the flat he recognises it. At the flat in Hazaribag a tenancy agreement for the second flat in Tilzala is recovered. When that flat is searched fake tax tokens and registration certificates for the car are recovered. It is later suggested that the car was stolen from Delhi and that a complaint had been lodged with Manas Saravar Police station. A motorbike was also seized from the flat in Tilzala. Most incriminatingly, a sketch map of the American Centre was also seized from the flat.

What happens in the Nasir TCA now is the core of the connection between the people accused and the foundation on which the session court dishes out death sentences to all accused. Group formation is taking place, the group's members are terrorist, and encompass all the accused at the session court stage. The key instrument for forming this group is the interplay between the two flats, the car and the motorbike on the one hand, and with section 120B of the IPC on the other. Creating vincula between the body of text relating to

²³⁴ Tilzala refers to a road, a lane and an area in Calcutta. Alternative spelling: Tiljala.

conspiracy and the insignificant events makes the law speak for itself. The IPC definition of conspiracy permits the prosecution to draw the line so that it encompasses all the accused. This delineation is at least initially successful and the session's court uses this to sentence all accused to death. The interaction between the persons, the objects and the conspiracy charge are such that all seven accused are included in the terrorist group by the Sessions Court. While the delineation undertaken at the Sessions Court level is modified at the appeals stage, excluding the printer group from the main conspiracy, the core conspiracy is maintained. Ultimately conspiracy, as we encountered above, hinges on the prosecution showing shared motive. Since motive plays a significant role in setting apart terrorism from other violent acts, making the terrorist speak their motive is a fundamental link in their articulation. Making the terrorist speak is achieved through the use of yet another body of texts.

6.3.4 The Motive – A few Emails and a Letter

What sets terrorism apart from murder, and waging war against the state from other violent acts, crucially involves the core of its intention. Intention is sometimes declared but in this case, and many other cases of terrorism, artifice has to be employed to make the terrorist speak their intention. In the Nasir TCA the prosecution story establishes this intentionality by translating intermediaries into mediators.²³⁵ The pieces of written and electronic communication, notebook, letter and emails are initially mainly intermediaries to transfer information from one person to the other, or in the case of the notebook to preserve detailed information accurately. They are intermediaries because in the primary purpose what goes in is also predictably what comes out. The prosecution however introduces them as circumstantial evidence in court and thus translates them into

²³⁵ Intermediaries and mediators have been discussed in the theory chapter, but as a quick refresher: Intermediaries transport relations predictably from one setting to the next. Mediators on the other hand have an impact on relations that play out differently depending on a large set of factors, thus effectively influencing the relations that they impact upon.

mediators. What comes out has a very indirect relationship with what went in. Making the detour from the person, to older texts, to intention, back to the person requires a slow and deliberate, step by step, following of the enrolments marking the chain of reference.

The first is a letter sent from Aftab to the widow of one Asif. According to the prosecution Nasir and Amir were school friends and Asif was Amir's brother. Asif and Aftab came into contact at Tihar Jail in Delhi where they were both imprisoned. This is brought to the attention of the court by Nadir Ahmed Khan. (P.W. 46) When Asif is killed in an encounter by security forces in Gujarat, Aftab wrote a letter expressing his condolences to the widow. According to exhibit No. 45/1, he not only expresses his condolences but also promises to take revenge. Exhibit No. 45/1 is exemplary of a phenomenon that has come up time and again in this inquiry. At the heart of exhibit No. 45/1 lies the original letter written by Nasir, or at least that is taken as an assumption by the actors in the TCA at the High Court and Supreme Court stage. But in practice exhibit No. 45/1 becomes its own actant which moves through the assemblage, is referred to by prosecutors, lawyers and judges, while the actual letter, presumably, remains locked in the evidence locker in Calcutta.²³⁶ Nevertheless, the two, original letter and exhibit No. 45/1 are in a relationship that in turn implies the relationship between Aftab and Asif's widow. Without the letter there would be no exhibit No. 45/1 in the Nasir TCA and without exhibit No. 45/1 the prosecution narrative of the revenge motive would be significantly weakened. Nasir is made to speak through the vincula which tie the letter into the TCA and create the links between a piece of paper and a past event.

The relations within which Aftab and Nasir are terrorist are partially predicated on the existence of material evidence. Not only of their involvement at the scene in one form or another, but also and this is

²³⁶ I haven't seen the letter and I haven't spoken with anybody who has seen the original letter. It is 'exhibit 45/1' that travels through the courts – since the Sessions Court accepted it as saying the content ascribed to it the original letter is not revisited.

the crux of terrorism, on the existence of a particular motive (A. Goswami 2002, 33). The Nasir TCA illustrates how one possible stabilisation of terrorism ties itself to the two components of the definition, the act and the intention behind the act. The gas engineer who negligently blows up a school full of children is not a terrorist. Neither is the comedian who takes on the state by virtue of her wit. Even as the original letter becomes sidelined by exhibit 45/1, its capacity to tie together Aftab, the killing of Asif and the incident in Calcutta (through the arguments of the prosecution), provides the glue for the TCA. The motive required in terrorism, also works as an explanation of the seemingly inexplicable brutality witnessed in the incident.

Nonetheless, “to explain is not a mysterious cognitive feat, but a very practical world-building enterprise that consists in connecting entities with other entities, that is, in tracing a network” (Latour 2007, 103). The courts are engaged in tracing networks and building worlds. This is essentially an effort at translation. The TCA therefore is both an assemblage in its own right and a choreography of actors tracing an assemblage. The actors who trace the terrorist assemblage (accused, acts, evidence) for the purpose of the Court, create a parallel second assemblage which mirrors the first. However, this second assemblage takes over more and more from the first as the case moves up the courts for appeal. The dynamics and interactive potential of that second assemblage is slightly different from the first as it becomes firmly tied in with the pre-existing legal assemblage. Its result is a carefully crafted chain of reference which articulates the terrorist fact making it speak for itself. This process of translations, enrolments and vincula crafting culminates in the judgment of the Court of Sessions. Which in turn translates knowledge and other actants for the High Court and ultimately the Supreme Court.

6.3.5 The Judgments as Mediators

The judgments are first and foremost mediators.²³⁷ In other words they provide a link between the proceedings at the Court of Sessions and the High Court and from there to the Supreme Court. But each judgment also translates between the judiciary and the prison or jail facility that has custody of the accused. It is not an intermediary as judgments often interact in unpredictable ways with new actants they encounter. Additionally, the judgment is a mediator between two assemblages. The court assemblage which includes all the obvious pre-existing actants, (judges, lawyers, prosecutors, court rooms, laws, procedures, investigators) and the not yet existent terrorist assemblage which includes an as of yet undefined mass of heterogeneous actants. As the court assemblage becomes a TCA, it first creates and then assimilates the terrorist assemblage. This process of creation and assimilation can be followed in the assemblage. In this process of translations, vincula are crafted which transform the machine operator and their machine, becomes a terrorist with a prohibited weapon, becomes an inmate and an inert plastic box in an evidence locker. A person becomes, first a person of interest, then a suspect, then an accused, then an appellant, then a petitioner, then an inmate unless they are returned to being just a person again. These processes of translation are made transportable via the judgment, which serves as a mediator between parts. Furthermore each translation in its final stage renders its own production invisible creating a stable sequence of facts. To cite Latour

“Facts were facts – meaning exact –
because they were fabricated –
meaning that they emerged out of

²³⁷ I am referring here to the three judgments in the Nasir case, Sessions Court, High Court and Supreme Court.

artificial situations” (Latour 2007, 90).

The TCA is an artificial situation out of which the fact of the terrorist emerges. The artful tracing and assembling of a Terror Court Assemblage creates and stabilises facts. It is again, very important to keep in mind that the aim of this critique is not to question the outcome – that there are terrorists. Rather my intervention aims to show that terrorists are a product of this artificial process rather than a naturally occurring input of it. The assertion that the fact of terrorism is artificial does not detract from its reality, but rather points towards its assembled and stabilised becoming. The terrorist fact is made to speak for itself, articulated by the chain of reference. “When we say that a fact is constructed, we simply mean that we account for the solid objective reality by mobilizing various entities whose assemblage could fail” (Latour 2007, 91). The role played by the successful TCA in assembling the solid reality of the terrorist is objective in the sense that its outcome is independent of any single individual’s opinion of it. However it should not be confused with a process of discovering a previously existing fact, the fact of terrorism only comes into existence by the successful mobilisation of the entities contributing to the TCA. If this mobilisation is unsuccessful failure is the result and there is no terrorist. We can see such failures in the becoming terrorist of Monti and Adil at the High Court and Bobby, Hasrat and Rohit at the Supreme Court.

The stabilisation of Nasir and Aftab is successful and their categorisation as terrorist becomes fact. This does not mean however that everybody has to agree with this fact, but most people most of the time would accept as fact that Nasir and Aftab are terrorist. As a result of the entire TCA Nasir and Aftab are stabilised and articulated as terrorist. Their actions become terrorism rather than revenge, resistance, murder or an almost infinite range of other categorisations. This terrorism requires an enactment, a performance and a choreography which come together in a solid chain of reference

as otherwise it remains unstable. The terror element as well as the intentionality element both so crucial to our understanding of terrorism are not obvious to the naked eye. They require the interaction and the performance of certain relations between actants for their stabilisation. It is this choreography that is played out at length in the TCA.

The above is an interesting choreography partially because it works even when the pre-existing legal assemblage does not have the category of terrorist pre-coded or programmed into it. The terrorist can be stabilised without specific counter-terrorism legislation. None of the laws, which ordinarily would seem like the blueprint for the assemblage, are pre-coded for terrorism in this particular case. Despite this, the legal assemblage is translated into a TCA, and it is widely accepted, by the judge, the media and the public that Nasir and Aftab are terrorists and their actions terrorism. This goes on to show how objects, in this case laws, behave as either mediators or intermediaries depending on context. “Objects, by the very nature of their connections with humans, quickly shift from being mediators to being intermediaries, counting for one or nothing, no matter how internally complicated they might be. This is why specific tricks have to be invented to *make them talk*, that is, to offer descriptions of themselves, to produce *scripts* of what they are making others – humans or non-humans – do” (Latour 2007, 79). These specific tricks are of course very visible in court where scripted formulations are routinely used. However this also applies to human actors and the careful choreography needed to enrol them in the TCA. “[H]umans, too, have to be made to talk; and this is why elaborate and, often, artificial situations have to be devised to reveal their actions and performances” (Latour 2007, 79). The court is the means by which the laws are made to speak. And it is because they are connected to humans that they shift from being intermediaries to becoming mediators. These mediators then interact unpredictably with in the TCA. The legal categories are used to transport meaning from the legislature to the judiciary, from the general to the specific and to tie

it in with a pre-existing legal assemblage. The trick invented to make them talk is both enabling and disabling, the law as mediator is not rigidly pre-programmed in its working application, but neither is it open to interaction from any actant. For example following the attacks, Harkat Jihad-i-Islami claimed responsibility (Bedi 2002). The judgment refers to the various terror groups, but does not make that a part of its own workings. The references to terror groups are not translated into legal actants. The claims of responsibility are not taken into account in the actual judgment, because the source of truth is the Court and not the narrative that is spun outside of it. The chain of reference builds up to articulate the individual, Nasir and the other accused, it stays detached from the claims of responsibility of non-articulated organisations. That the court reaches a parallel conclusion is almost coincidental.

6.4 Soldering the Two Assemblages – Nasir Traveling up the Courts and Embedding in a Network of Precedent

We encountered the processes of translation above. The actors of the legal assemblage engage in crafting a chain of reference which assembles a terrorist. In this process elements of the pre-existing legal assemblage and the pre-existing security assemblage come together in the chain of reference. Through this the chain of reference combines the familiar hesitant process of the passage of law but also includes some shortcuts which make sense as modalities of the security assemblage. The chain of reference, once assembled, reaffirms the passage of law by making the shortcuts invisible and making the facts speak for themselves. The legal identity of the TCA is maintained through embedding it, via a proliferation of vincula, in a network of precedent, while translations are taking place all the time. It would be tempting to see the Court of Sessions, the High Court and the Supreme Court as more or less differently qualified and powerful institutions. After all, more or less the same rules of procedure apply, the same laws interact with them all and the judges often moved up through the ranks, and perceive the courts as reflections of a successful career. But from a TCA point of view there is a clear

distinction between the Court of Sessions, and the two higher Courts. There is significant difference in the working and operation of the court of first instance and those of appeal. It is in the Court of Sessions that the chain of reference becomes initially inscribed, this initial translation is intended to make intermediaries out of mediators. It also articulates terrorist facts to make them speak for themselves. The Court of Sessions makes texts with objects (including texts) and people, whereas the other two courts make texts with texts. As such the exposure to the pre-existing security assemblage becomes less and less visible as the TCA moves up the ladder of appeal. The artificial nature of the stabilisations undertaken in the first instance also become buried deeper and deeper under layers of connections with the pre-existing legal assemblage naturalising the TCA's own processes. Following Nasir and Aftab in their becoming terrorist we encountered a number of other actants that have played a role in stabilising this translation. But the initial dynamic is set at the Sessions Court where a series of insignificant events become crafted into a stable chain of reference capable of articulating terrorist facts. The later translations are always influenced by the scope set in the beginning. For example a continuous source of frustration during my participant observation was that stabilisations of evidence undertaken at the Sessions Court are extremely difficult to break up at the higher courts. However since defence lawyers at the Sessions Court are usually amongst the worst paid and most junior very often the prosecution managed to get things on the record that according to the more senior lawyers at the higher courts should not have been there. The chain of reference becomes increasingly sealed, detours and shortcuts, and breaking up or even scrutinizing any link is not an easy undertaking. That they are now almost unable to do anything about this shows how the TCA gains momentum early on and increasing amounts of effort are required to change this momentum. This transformation of the TCA from very specific translations, shortcuts and prehensions, in which the pre-existing security assemblage is still very visible, to more and more abstract legal points

goes hand in hand with an embedding in a network of precedent. The concrete and specific detail of the case becomes abstracted more and more which ties it in more and more firmly with the pre-existing legal assemblage. However this also means that the initial translations become less and less visible and deviations from the slow, hesitant and deliberate passage of law become suppressed.

6.5 Case Study I Conclusion

In the case study of the Nasir TCA we observed how the legal assemblage operates in a terror setting to stabilise a small group of people as terrorists. The assembling of a sturdy chain of reference to articulate the terrorist fact passes through modalities of law as well as modalities of security. The terrorist is stabilised relationally through work and processes which involve very little of what we would consider the essence of terrorism. This stabilisation effort is hard and precarious. This difficulty and imminent possibility of failure clashes with the broad-brush definitional effort of the legal and popular concepts of terrorism. The consequence of this tension, in this case study, is an ever-shrinking group of people to which the definition applies. Increasing abstraction from the moment of terror makes the stabilisation of individuals as terrorists more and more difficult. Mediators play a fundamental role in translating the moment of terror into a stable terrorist. These mediators however are also translated from one instance to the next. Successfully enrolling actors as terrorists/counter-terrorists has powerful effects. We “should treat power as an effect of sets of variegated and differentially successful strategies to enrol others rather than as cause of that success” (John Law 1986, 5). The terror setting is a highly successful enrolment strategy, but one which is not new to the world with the GWOT. As a setting, terror, very often is successful even in the absence of coding for it. In other words, the success of enrolling others in their respective groups of counter terrorist and terrorist is successful even when these two groups are not pre-scripted in the law and no specialised security legislation is used. In this case study I have shown, through a number of examples, how the terrorist fact is made

to speak, articulated by a chain of reference crafted and refined through stages of the TCA. Terrorists are not inputs of terror court assemblages but are their outcome, precariously stabilised through work intensive processes of enrolment, choreography and the crafting of vincula. As the TCA churns on through the layers of appeals these initial processes of translation are more and more naturalised and buried under connections with the pre-existing legal assemblage. Retracing them has illustrated how precarious their stability is and how much work is required to choreograph the soldering of the pre-existing security assemblage with the pre-existing legal assemblage to make invisible their modalities. The next chapter turns to the second case study. Relating to an incident that took place before the Global War on Terror the Aftab TCA is nevertheless much more complex than the Nasir TCA. It reinforces the insights of the Nasir TCA while also showing how a much broader range of different incidents are linked to create one terrorist whole.

Chapter 7 – Case Study II / Aftab’s Stabilisation

7.1 Chapter Introduction - Three Crucial Translations

This chapter illustrates in a different context the stabilisation processes going into the making of a terrorist. The crafting of the chain of reference relies upon a proliferation of tiny vincula between the existing body of texts and insignificant events. This can be seen clearly in this case study. The sequence of translation, stabilisation and inscription can be seen when we follow “the trace left behind by some moving agent” (Latour 2007, 132). In this case the moving agent we follow is Aftab whose full name is Aftab Saeed Ahmed Shaikh. He is accused in the 1998 Mumbai Blast Case and is articulated by the TCA as a terrorist. The techniques necessary to articulate him as a terrorist fact, and to make him speak, are much more focused on crafting a chain of reference across time, vincula creation between legal categories and insignificant events and finally the way that the terrorist is made to speak his motive. The same caveat about the fluidity addressed in section 6.2.1 applies.

Before we dive into the TCA, a few more remarks on the context are needed. The incident this case relates to takes place in the special law vacuum between the repeal of TADA in 1995 and the introduction of POTA in 2001. It is therefore a case of regular criminal law, taking place in a regular Court of Session. Nevertheless the actors, including the judges, talk about the accused as terrorist despite this not being a legal category in India at the time. This also applied to the first case study, but we have moved back in time another three years and therefore are faced with the lateral influence of another legal regime. The Terrorist And Disruptive Activities Act (TADA), despite being repealed, haunts the case. Its linguistic categories influence the way that the prosecution structures its arguments and in the way in which the judge formulates his opinion of them. If we reverse Latour’s words “if an actor makes no difference, it’s not an actor,” we have to conclude that TADA despite being repealed remains an actor in this

case (Latour 2007, 130). As such the Aftab case study illustrates the working of the TCA in stabilising Aftab as a terrorist using a variety of likely and unlikely actants. The stabilisation process takes the following route:

- a) a point-to-point connection is
being established, which is
physically traceable and thus can
be recorded empirically;
- b) such a connection leaves *empty*
most of what is *not* connected
[...]
- c) this connection is not made for
free, it requires effort [...]

(Latour 2007, 132).

Latour adds a fourth category, which we will encounter below. In the process of this stabilisation we can observe many of the same, ordinary and mundane processes of translation that we encountered in the previous chapter. In a TCA the point-to-point connection is usually one of connecting a pre-existing body of text to an insignificant event, which we discussed before as a *vinculum*. For example, in the Nasir TCA the bullets found on scene are connected to an AK47 and this AK47 is in turn both connected to the accused and to the legal category of prohibited weapon. This *vinculum* becomes a link in the chain of reference recorded in the trial record. The inscription also makes it able to travel. Nonetheless, this leaves an empty field of virtual possibilities, the ‘not’-connections. In the realm of counterfactuals there are unlimited potential connections and it is only with the benefit of hindsight that the connections that are being made appear obvious. In the working this is not effortless, to not only make the *vincula*, but also inscribe the chain of reference

requires the effort of the TCA actants. For example, the police officer who collected the AK47, the ballistic experts who wrote their opinion, the prosecution who introduced it, the judge who accepted it and Nasir who contributed his capacity to be guilty of using a prohibited weapon. In fact affects towards other actants in the TCA is a good way of understanding participation in the assemblage.

As we have seen above, interactions in the TCA take the form of translations and enrolments. The first crucial one is the initial translation of an actant on course to assemble the TCA. With hindsight this may appear like a chicken and egg moment, as it is at this point that the TCA begins to assemble. However, this is only so because each connection made via Latour's points a) b) and c) is initially a precarious connection. Before it is stabilised it could fail, and many connections, which are not stabilised successfully, do fail. Since we are looking with hindsight at TCA's which have been successfully stabilised (as TCA's) both our case studies suffer from selection bias making this precarious nature of the initial translation invisible. Furthermore one of the most interesting processes in the TCA is that as a part of its stabilisation and inscription the very precarious nature of the processes in the TCA is naturalised and concealed. The crafted nature of the chain of reference gives way to facts which are made to speak for themselves. Ultimately the TCA produces artefacts, which are then inscribed into legal facts capable of traveling and connecting to other legal facts.

The purpose of this case study is to illustrate the working of a TCA in a considerably more complex case than the Nasir TCA. It also underlines that while each TCA is unique, the difference between Aftab's pre-9/11 TCA and Nasir's post-9/11 TCA are not as great as we might expect. The Aftab TCA is pre-9/11 as its legal regime and background all come from the 90's. We need to acknowledge that since the initial judgment was only handed down in 2004, 9/11 and the, for India, equally important parliament attack on 13/12 occurred about halfway through the proceedings. Nevertheless, the legal framework brought into tension with this TCA is not yet shaped by

the Global War on Terror, even if its interpretation might be.²³⁸ The processes taking place at the ground level of making a terrorist are just as ordinary as the ones taking place in any other trial but the repercussions are significant. A terrorist can be stabilised even in the absence of specialised laws. It also further illustrates how the moment of terror during the incidents travels and is connected to other moments of terror to map terrorism. In order for it to travel it needs to be translated and inscribed into a mediator, such as the judgment, which allows it to be transported. This is the second crucial translation. The third crucial translation is that of retracing the network as part of this account and to inscribe it into this inquiry. The chapter therefore proceeds with six more sections, first introducing the Aftab TCA specifically, then working backwards from the Incident. Our focus then turns to the translation and the inbuilt betrayals. Before section 7.7 concludes I propose an understanding of the judgments as mediators.

7.2 Introduction to the Aftab TCA

Much like the Nasir TCA, the Aftab TCA takes place in the aftermath of a terrifying incident, or rather in this case a series of incidents. As with the Nasir TCA the narrative of what happened is powerful but by no means uncontested or entirely coherent. Gaps in the chain of reference and occasional acceleration of the slow passage of law underscore the working of the TCA. Most importantly, and again this resonates with the previous chapter, we cannot take the narrative for granted. Rather we have to work backwards starting with the relatively stable account emerging from the inscriptions. Then we can move onto ever more precarious territory as we retrace the circulations. In tracing these circulations that make up the TCA we re-encounter the precariousness that has so successfully been

²³⁸ The American led Global War On Terror following 9/11 has had a profound impact of what is considered acceptable in democratic states fighting terrorism. From military tribunals in Guantanamo, to extraordinary rendition and torture memos the way that security assemblage and legal assemblage interact has been influenced.

concealed in the final inscription. By now the conundrum of recounting the story of an incident in order to gain access to the making of that very story is a familiar one. Nevertheless it is important to keep in mind that the overview of the incidents provided below is inextricably linked to the working of the TCA and needs to be regarded as an artefact of the interactions in the assemblage rather than as the source of the assemblage. The judgment and the coherent chain of reference which articulates terrorist facts to speak for themselves is a product of processes of translation, stabilisation and inscription.

7.3 The Incidents – Working Backward

The Aftab TCA is significantly more complex than the Nasir TCA. This complexity plays out in two ways. Firstly there is not one incident which then works its way backwards and forwards, there are six explosions. Secondly there are many more actants that play transient roles in the TCA. This leads to actors, for example the lead investigators of each individual blast, to show up briefly, leave a few traces and disappear again as the cases are consolidated. But the movement from perplexing complexity to articulate coherence is something that we can observe in this case as well. Additionally the chain of reference which articulates Aftab as terrorist makes him speak the motive for his actions through a laborious detour which stands in contrast to the shortcuts which are inbuilt.

7.3.1 The Judgment

On the 29/06/2004 and on the 09/07/2004 the Hon'ble Judge Shri Achliya delivered his judgment in the sessions cases Nos 643/1998, 643-A/1998 (i.e. 160/2000) and sessions case no. 1135/1998. The inscribed narrative of the incidents emerges by working our way through the judgment. While this narrative is the final translation of the TCA (at least for the Court of Sessions, before traveling to the High Court and Supreme Court), it is the first step for our inquiry into the Aftab TCA. From the judgment we can work our way to

retracing the assemblage that made it arise and the inscription that stabilised Aftab as a terrorist.

The terrifying incidents were six explosions in the city of Mumbai:

1	28/08/1997	Jama Masjid
2	23/01/1998	Kanjumarg / Vikroli
3	24/01/1998	Goregaon / Malad
4	27/02/1998	Golibar, Santacruz
5	27/02/1998	Kandivali
6	27/02/1998	Virar

Spread out over several months, the explosions are divided into three episodes. The first isolated explosion at the Jama Masjid half a year before the next two blasts. The final three explosions took place within a day and one month after the previous two. Let us go through the incidents chronologically. The interweaving of the investigation and narrative of six incidents adds a layer of complexity not present in the Nasir TCA. Therefore each blast has its own subsection.

7.3.2 Jama Masjid Blast

On the 28/08/1997 a bomb blast occurred at the Jama Masjid, a mosque in Mumbai. The explosion occurred in the latrine of the mosque and caused no loss of life, minimal property damage and only minor injuries to one person. Following the explosion, the police's Bomb Detection and Diffusing Squad deposed of one additional live bomb and a few detonators. The two police officers in charge, PI Ajit Deshmukh (PW 35) and PSI Shengle (PW 15), drew up a Panchnama for the evidence collected.²³⁹ They also took the statement of one Mr Deepak Seth (PW 6; The mosque's janitor). But no inroads were

²³⁹ The Panchnama is a safeguard in Indian procedural law that requires the police to collect the signatures of five (Panch means five and nam means name) independent witnesses on scene when taking in evidence to prevent its fabrication or the claim that its fabricated in court. While not enshrined in law itself it is considered to emanate from Sections 100 and 174 of the CrPC which govern police reports.

made into solving the case and it was eventually handed over to DCB CID, no date for the handing over is provided in the files of the case or the court. At the time the case was not considered high priority as the only injury was done to the person fiddling with the bomb, who the police presumed to be the bomb maker. Initially, this bomb explosion was not dealt with as terrorism, and only upon becoming tied in with the other five cases did it gain relevance for establishing the conspiracy over time which is an essential vinculum.

7.3.3 Kanjumarg / Vikroli Blast

Around 4 months later, on the 23/1/1998, another bomb exploded in Mumbai, this time on the railway track between Kanjurmarg and Vikroli stations. Initially this case was investigated by PSI Hanumant Chavan (PW 36) who later handed it over to PI Sangle. Unfortunately, PI Sangle could not be deposed in court as he passed away in December 2000. An important vinculum emerges when the investigators cause a chemical analysis of evidence to be undertaken. According to the prosecution, the analysis confirmed that Potassium Nitrite, Sulphate and Sulphate constituents were found on the scene (Exh. 178). In the absence of an expert the Prosecution argues that this is the expected finding after a gunpowder explosion has taken place. During my participant observation it became evident that contrary to expected practice, the court never cross-examined any representative of the chemical analysis laboratory to confirm their findings. The speculation amongst the lawyers in the office where I was a participant observer at the time was that this was due to a lack of active involvement of the defence attorneys in the Sessions Court trial. To the great frustration of the lawyers at Ms Nitya Ramakrishna's chambers, such a passive behaviour by defence attorneys at the lowest level isn't rare. In a parallel to the mechanism identified by Scheffer non-action at the lowest court prevents the appeals lawyers from making a strong case about evidence. (Scheffer, Hannken-Illjes, and Kozin 2007) The result of the way the procedural blueprint is set up for the courts is that once the findings have been

translated, stabilized and inscribed in the TCA it becomes very difficult to destabilize them again.

7.3.4 Goregaon / Malad Blast

One day after the explosion on the Kanjurmarg-Vikroli rail track, another explosion occurred on the railway tracks between Goregaon and Malad. This explosion caused damage to property, bending an electric pole and breaking the windowpane of a carriage, and a number of injuries to both the driver and passengers. Head Constable Devrao Sukale (PW 29) was the first officer on the scene and carried out the initial investigation. Subsequently the early investigation was taken over by PSI Ramakrishna Dhole (PW 14) who drew up a Panchnama with respect to the collected evidence and filed the offence as crime no. 31 of 1998 against Sections 3 & 4 of the Explosive Substances Act and under 151, 153 Indian Railways Act as well as Sections 437 and 337 of the IPC. PI Digambar Tajwe (PW 39) undertook the follow up investigation and visited the scene on the 25th January. Satisfied that the explosion had occurred on account of a bomb, he recorded PSI Dhole's statement and treated it as the FIR (Exh. 59). He also added section 5 of the explosive substances act and sections 437 and 337 of the IPC read together with section 34.²⁴⁰ The investigation at this stage was undertaken in fragments with a lot of interchange of police personnel who each add to the layers and the complexity of the case.

In the evening of that same day the statement of Bharat Palkar (PW 7) was recorded, including a description of four persons. Palkar's statement, his ability to identify the accused and his cross-examination regarding the statement was relied upon by both Sessions and High Court. Additional statements were taken, but they

²⁴⁰ Section five of the Explosive Substances Act prohibits the making or storing of explosives under suspicious circumstances. Whereas Section 437 of the IPC relates to mischief with intent to destroy or make unsafe a decked vessel; and Section 337 IPC relates to causing hurt by an act endangering life or personal safety; ultimately Section 34 IPC describes it as an act done by several persons in furtherance of a common objective.

were neither added to the evidence nor were their authors produced as witnesses in court. The selective translation, stabilization and inscription of the connection made through Bharat may have seemed obvious as a tactical choice to the prosecution. But it also means that other virtual connections go untranslated, unstabilised and uninscribed. The specific connection that contributes to the stabilization of Aftab and his co-accused as terrorist is selected by the prosecution and is the only one recorded.

The discretionary nature of creating vincula that contribute to the stabilization is further illustrated in the way that expert reports are commissioned. The investigators ordered a chemical analysis of property and of blood found on the railway tracks. The blood at the Goregaon blast site, that most likely came from a victim was analysed by forensics. Whereas the blood found in the Jama Masjid, which was the blood of a potential suspect was not analysed. This illustrates the low priority with which the Jama Masjid blast was treated initially and in isolation. The chemical analysis was once more introduced to the court by the prosecution rather than the expert.

Finally, following the arrest of 8 suspects by the DCB CID the Goregaon blast investigation was handed over to the DCB CID Unit Nr. VIII, on the 28/03/1998 in order to be linked with the other cases under their investigation. Linking all the explosions as a series of attacks, rather than isolated incidents strengthens the translation of these blasts as a terrorist conspiracy.

7.3.5 Golibar / Santacruz Blast

The first explosion causing fatalities occurred on the 27/2/1998 near the Bhura Qureshi Chawl in the Mumbai area of Santacruz. However, while this deadly blast was more severe than many of the others, later on during the trial the prosecution maintained that this was not an intentional part of the terrorist conspiracy. Rather the prosecution presented it as an accidental explosion due to the tripping and falling of one of the suspects.²⁴¹ PI Ravindra Patkar (PW 43) initially investigated the explosion and on arrival found police from a

²⁴¹ P.15 Session's Court Judgment.

different station at the scene. When the bomb squad was called, one further bomb was discovered and disposed of. It transpired from a statement made by an eye witness named Smt. Ahmed Begam, that one person identified as Ashfaq was carrying a bomb and was severely injured on the scene when he tripped and fell causing the bomb to fall and explode. He was taken to hospital. According to the prosecution, a suspicion already fell at that moment on Ashfaq's brother Aftab who would later be the main accused in the trial. It is unclear where this suspicion arose and whether besides general fraternal ties there is any additional basis to it.

On the following day (28/2/1998), after filing of a FIR (Exh. 167) under sections 302, 307, 326, 427 read with section 34 of the IPC and Sections 4 and 5 of the Indian Explosive Substances Act, the investigation was handed over to DCB CID, Unit No. VIII. The investigating officer from DCB CID proceeded to interrogate Ashfaq immediately, who was recovering in Hospital from the massive injuries sustained on the previous day during the explosion. In addition to general trauma, he had lost both legs, one hand and an eye in the blast. According to the police, he cooperated and in return for a conditional pardon made a full confession/disclosure of facts incriminating both his brother and Pakistan's ISI. A magistrate granted him approver status and issued a conditional pardon. The interrogation also led the police to search the house of Ashfaq's brother Aftab (Accused No. 1) where chemicals were recovered. According to another (non-introduced) chemical analysis, these chemicals were of the same chemical properties as the explosive residues found on the scene, essentially gun powder.²⁴² The vincula being created between stored chemical formulae and the matter found on the scene are a necessary detour to establish connection between the matter found in one place and matter found in another. Following the slow paced investigation into the first three blasts, things now take off. In summary the chronology of events: Ashfaq

²⁴² (Seizure memo Exh. 115 and referral to C.A. Exh 198 and report Exh. 173).

trips in the market at around 1330 on the 27.2 he loses both legs as well as a hand in the blast which costs two other lives but does not cause the second live bomb on scene to explode. He is then taken to the Nair Hospital where he undergoes surgery including the amputation of the mangled limbs. On the following morning the case is handed over to DCB CID who immediately proceed to interrogate him in hospital. Just about 24 hours after the explosion the house of his brother is searched and the recovery of the white liquid and powder made which in subsequent chemical analysis is shown to be similar to recovered bomb materials. This recovery creates a procedural inroad for other evidence gathered contrary to procedural safeguards. For instance in the court records there is no indication that questions were raised at this stage about the confession of Ashphaque. Made within 24 hours of a triple amputation, arguments could have been made about the impact of shock, pain and anaesthetics on his capacity to make a reasoned confession. Nevertheless this is the first breakthrough with the investigation. The recovery of potential bomb materials has for now completely silenced any discussion surrounding the validity of the confession. For the first time the police actually have a suspect, Nasir.

7.3.6 Kandivali Blast

The fifth explosion occurred on 27/2/1998, at the Kandivali Railway Station. PI Tajwe (PW39) investigated this particular case. This blast cost one life, that of Mahendra Poonamchand Sanghvi, as well as causing a number of injuries and insignificant property damages. A crime was registered under 302, 307, 326, 325, 324, 427, 120-B of the IPC as well as 3, 4 and 5 of the Explosive Substances Act and Section 151(1) and (2) of the Indian Railways Act. The FIR (Exh. 127) was also filed. While the High Court acquiesces that PI Tajwe was unsuccessful in his investigation, it also takes note of a Test Identification Parade undertaken by him with respect to the crime.²⁴³

²⁴³ Test Identification Parades are essentially governed by section 162 of the CrPC – statements made to the police. This means that they are not generally to be

However, the results of the TIP are not further discussed in the judgment.

7.3.7 Virar Blast

The final explosion occurred on 27/2/1998 on the platform at Virar (West). PI Hemraj Choudhary (PW 41) was in charge of the initial investigation. It caused the death of one person, Sabestian Mendis. When the police officer arrived at the scene, he discovered that one body was lying amidst some debris. Some evidence was collected and the body dispatched to the Rural Hospital for a post mortem examination. PI Choudhary lodged a report that a crime had been committed by an unknown person under Sections 4 and 5 of the Indian Explosive Substances Act, under Sections 336, 304, 120-B of the IPC as well as Section 37(1) read with Section 135 of the Bombay Police Act. PI Choudhary proceeded to record witness statements, including the statement of one Kishore Shetty (PW 32). The identity of the deceased was established as Sabestian Mendis [sic], and his house was searched but nothing incriminating was found. It is at this stage on the 28/02/1998 that DCB CID became involved and that PI Choudhary learned that there had been arrests made in similar cases. Subsequently a Test Identification Parade was held at Arthur Road Jail and investigation was transferred to DCB CID, Unit Nr. VIII, which also submitted the charge sheet. The result of the TIP was not recorded, or at least its record did not make it into the case file.

The character of Sebastian Mendis was rather puzzling. His appearance and role at the scene is not used for any connections, except to explain his own death as a casualty of the bomb – that is later attributed to the conspiracy between Aftab and co. According to the story presented by the prosecution based on the statement of Kishore, Shetty Sabestian died accidentally. In contrast to the barely alive Ashphaque, no attempt was made to explore Sabestian's role

used as evidence. For a discussion of their admissibility and evidentiary value see for example *Amitsingh Bhikamsing Thakur vs. The State of Maharashtra* (2007) 2 SCC 310.

any further. He died in the bomb explosion of a bomb he was carrying. Eye witnesses suggested that he was carrying the bomb in a back pack but no attempt was made by the police to link him to the conspiracy. There were two practical theories circulating in the office at the time of my fieldwork. Firstly, that this was because there was no need/point in prosecuting him as he died on the scene. Secondly, this could be because there was some evidence suggesting his innocence. Another more conspiratorial theory leaves it as an open question: whether it is his Christian background that caused Sebastian Mendis not to fit with the overall conspiratorial framework.

Before we turn our attention to the translation of the incidents and the making of legal connections, let me re-emphasize the complexity and heterogeneous nature of the Aftab TCA as we have encountered it from the case study so far. In contrast to the Nasir case study this one has a large number of moving parts. For six incidents taking place over an 8 month period, there are over ten investigating officers before all six cases are joined and handed over to unit VIII of the DCB CID. In this process connections are made, such as the one between Aftab and his brother Ashphaque. Others are unmade, such as the one between Ashphaque and the conspiracy, through his approver status. Yet more connections are never traced, such as the one between Sabestian and the conspiracy. Finally some connections are stabilized just long enough to allow for another connection to be made before falling apart. An example of this is the confessional statement of Ashphaque, later retracted, which incriminates his brother and the ISI. According to the prosecution this led to the recovery of the off-white liquid from Aftab's flat. We are therefore presented with a multifaceted picture out of which some persons emerge as terrorists whereas others fade into the background. Following the laying out of the legal categories to which elements are connected we will focus on the IPC, the Indian Railways Act, The Prevention of Damages to Public Property Act and the Ghost of TADA.

7.4 Translations, Laws and Legal Categories

The events are connected with a number of legal categories through carefully crafted vincula which allow the chain or reference to articulate terrorist facts. Some of these connections and translations are very similar to the ones encountered in the Nasir TCA, others are slightly different. Again it is important to note that there is no special counter terrorism legislation in use in this case study. The terrorist is made to by a chain of reference which detours via crimes under the Indian Penal Code, Railways Act and the Prevention of Damages and the Public Property Act. The pivotal legal machine connected to make the terrorist facts speak for themselves is conspiracy.

7.4.1 The Indian Penal Code

The provision 120-B of the Indian Penal Code (IPC) which relates to the crime of conspiracy was introduced at length in the previous case study. Just as a brief reminder, 120-B makes membership in a conspiracy to commit an offence punishable in the same manner as if the accused had abetted the said offence. Additionally Aftab and the other accused are charged with an array of other charges under the IPC. While it is the conspiracy charge that contributes most strongly to the terrorist stabilisation, the other charges contribute to stabilising the effects of the blasts as attributable to the conspirators, strengthening other vincula and solidifying the chain of reference. The first section used is murder under 302 of the IPC.²⁴⁴ The second section is 304 of the IPC, culpable homicide.²⁴⁵ This is followed by

²⁴⁴ 302. Punishment for murder.—Whoever commits murder shall be punished with death, or 1[imprisonment for life], and shall also be liable to fine.

²⁴⁵ 304. Punishment for culpable homicide not amounting to murder.- Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death.

attempted murder in section 307 of the IPC.²⁴⁶ Additionally section 326 of the IPC is mentioned, this section makes punishable the voluntary causing of grievous hurt by dangerous weapon or means.²⁴⁷ This is followed by the slightly less severe version in section 324 of the IPC.²⁴⁸ The final section of the IPC that is connected relates to causing mischief by fire or explosive substance in section 435.²⁴⁹ All

²⁴⁶ 307. Attempt to murder.- Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable to imprisonment for life, or to such punishment as is hereinbefore mentioned.

²⁴⁷ 326. Voluntarily causing grievous hurt by dangerous weapons or means – whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or by means of fire or heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

²⁴⁸ 324 Voluntary causing hurt by dangerous weapons or means. – Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

²⁴⁹ 435. Mischief by fire or explosive substance with intent to cause damage to amount of one hundred or (in case of agricultural produce) ten rupees. – whoever commits mischief by fire or any explosive substance intending to cause, or knowing it to be likely that he

these offences which translate the violent magnitude of the incidents into legal categories of crime are read with the conspiracy charge.

7.4.2 The Indian Railways Act

The prosecution narrative aims at establishing infrastructure and the Indian public as the main targets of a terrorist attack. Those blasts that took place near the railways are additionally highlighted through the use of the Indian Railways Act of 1989. Sections 150 which criminalises acts in relations to railways that intentionally cause harm or death and 151 which aims at property damages are read in combination with 120B of the IPC to tie those to the conspiracy as well.²⁵⁰ This adds another potential avenue to call for the death

will thereby cause, damage to any property to the amount of one hundred rupees or upwards or (where the property is agricultural produce) ten rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

²⁵⁰ 150(1) Subject to the provisions of sub-section (2), if any person unlawfully, -

[...]

(e) does or causes to be done or attempts to do any other act or thing in relation to any railway, with intent or with knowledge that he is likely to endanger the safety of any person travelling on or being upon the railway, he shall be punishable with imprisonment for life or with rigorous imprisonment for a term which may extend to ten years:

[...]

(2) If any person unlawfully does any act or thing referred to in any of the clauses of sub-section (1) -

(a) with intent to cause the death of any person and the doing of such act or thing causes the death of any person; or

(b) with knowledge that such act or thing is so imminently dangerous that it must in all probability cause the death of any person or such bodily injury to any person as is likely to cause the death of such person, he shall be punishable with death or imprisonment for life.

151 of the Indian Railways Act reads:

151. (1) If any person, with intent to cause, or knowing that he is likely to cause damage or destruction to any property of a railway referred to in sub-section (2), causes by fire, explosive substance or otherwise, damage to such property or destruction of such property, he shall be punishable with

sentence under 150 of the Indian Railways Act but more importantly it stabilises the incidents as targeted at critical infrastructure.

7.4.3 The Prevention of Damages to Public Property Act and the Foreigner's Act

Two other Acts play a role in the Aftab TCA. Their role is important although they seem thrown in almost as an afterthought to the framing of charges. The first is Section 4 of Prevention of Damages to Public Property Act (1984).²⁵¹ This reinforces the public as the target of these incidents. The second is connected only with accused No. 9 Javed Gulam Hussain Shah but is crucial in stabilising the link to Pakistan. Section 14 of the Foreigner's Act (1946) prohibits the overstaying of those on a visa and criminalises any action in contravention of the conditions of the visa. The inclusion of this, even though it is only linked with one of the accused reinforces the international nature of the conspiracy. More explicitly it allows the prosecution to repeatedly paint the terrorist attack as having a strong link to Pakistan.

7.4.4 The Ghost of TADA

With the crimes taking place in 1997 and 1998, the law applicable to this trial falls into the time period without an applicable law against terrorism specifically. The Terrorist and Disruptive Activities (Prevention) Act (TADA) lapsed in 1995, and while the Indian Law Commission soon submitted a draft replacement, it sat on a desk until shortly after the dramatic attacks on the World Trade Centre in New York and Parliament in Delhi in 2001. The short succession of

imprisonment for a term which may extend to five years, or with fine, or with both.

²⁵¹ 4. Mischief causing damage to public property by fire or explosive substance. – Whoever commits an offence under sub-section

(1) or sub-section (2) of section 3 by fire or explosive substance shall be punished with rigorous imprisonment for a term which shall not be less than one year, but which may extend to ten years and with fine: provided that the court may, for special reasons to be recorded in its judgment, award a sentence of imprisonment for a term less than one year.

first 9/11 and then 13/12 facilitated the passing of the Prevention of Terrorism Ordinance into law in a joint sitting of parliament on the 26th of March 2002 (Venkatesan 2002). However, the laws applicable to this trial, are only the ones applicable under normal criminal jurisdiction; i.e. a combination of the Indian Penal Code and Railways Act as seen above. This oddity further calls into question the need for specialized legislation. An idea often put forward by the defenders of that need is that criminal law is too lenient on the accused and too tough on the investigating agency/police to achieve convictions in terrorism cases. In this particular TCA, not only is the court very lenient on the lapses of the prosecution to follow the letter of the law, but also the language of the court remains influenced by the categories of TADA. The provisions of TADA are inapplicable. And the court does not try to apply the stringent reversal of the onus of proof, the police confessions and the other procedural differences from the IPC found in TADA. However, judicial discretion and judicial application of mind play a considerable role in the particular arrangement of connections in the TCA. If the Judge uses language lifted from TADA to arrange certain connections, this allows TADA to continue playing a role in ordering the TCA. The use of TADA-influenced categories by the judge in his judgment, such as the reference to terrorist and disruptive activities in paragraph two of the Session Court judgment, is indicative of the lingering effect of special laws, even if repealed. Compared to the process and practice of adjudication in the TCA, the changes in the rules of procedure are generally of a somewhat abstract and distant character. Therefore even as the judge continues to phrase things in categories taken over from TADA the amended laws of procedure are followed in their letter if not their spirit. The language used by the court to categorize the offences committed in the TCA is not one of the categories in the Indian Penal Code (IPC) or Railways Act listed above, but rather one of the categories found in TADA. There are three instances in the Sessions Court judgment where terrorist and disruptive activities appear in the same sentence to describe offences committed by the

accused.²⁵² Neither disruptive activities nor terrorist activities are categories of offences under the general laws that do find explicit application.

It is in this context that the important role of the Sessions Court is most evident. While the High Court and the Supreme Court both have the authority to re-appraise evidence, this is in practice very rarely done. Usually the evidence passed upwards from the Sessions Courts is accepted as collected in accordance with procedure. This creates a flow in which the inscribed connections, judgments, percolate up through the courts in a sequence of translations, as we have seen in the example of the AK47 and its travels in section 6.3. Information and evidence collected and initially translated by the Sessions Judge is inscribed into the judgment, which then acts as a mediator for subsequent translations. This shapes the range of information and plausible avenues of translation available for adjudication in all subsequent discussions. But as we have seen in this case, if the Sessions Court continues to operate with a mind set shaped by a repealed law, TADA in this case, then this shapes what translations are inscribed into evidence. That the translations and inscriptions effectuated at the Sessions Court are so difficult to reopen at the High Court and Supreme Court accentuates the risk emanating from the tension between translation and betrayal (*trahison*). The chain of reference inscribed in the judgment powerfully articulates the terrorist to make the facts speak for themselves.

7.5 Traduction/Trahison

The translations in section IV that focused on the connections between the incident and the pre-existing legal assemblage. In this section the focus shifts to three instances where the stabilisations are particularly apparent and a the modality of slow and deliberate law clashes with the modality of fast and prehensile security. The first section looks at the stabilisation that is narrated as the breakthrough in the investigation. The second section turns to the role of one

²⁵² Paragraphs 2, 110 and 200 of the Aftab Sessions Court judgment.

particular witness in making the terrorists speak their motive that is so crucial to both conspiracy stabilisation and terrorism. Finally the third section turns to the way in which Test Identification Parades (TIPs) are used to make connections but how the expected slow process is often supplanted by a shortcut.

7.5.1 The Breakthrough – Accidents, Approver and Recovery

The initial case of the prosecution is built on the statement made by Ashfaq Sayyed Khan (Ashfaq), the brother of the primary accused Aftab Sayyed Khan (Aftab). The prosecution connects this statement to allow them to seemingly make events speak for themselves. Ashfaq and two others were walking with their bombs when Ashfaq tripped over a pipe and fell. The bomb he was carrying in a shoulder bag, hit the ground and exploded, killing two bystanders and causing him severe injuries. His two co-conspirators were unhurt, and one dropped his bomb and both ran away. This was alleged to have happened on the 27th of February. When the police arrived on the scene, a Panchnama²⁵³ was drawn up and Ashfaq was taken to hospital. The bomb remaining on scene was defused and taken by a bomb disposal squad. On the day after, presumably only hours after Ashfaq had undergone major surgery, including the amputation of both of his legs, as well as other major injuries, the Police Officer in charge of the investigation at this stage interrogated him. At this point it is recorded that the investigating officer learned that Ashfaq was willing to become an approver. An approver is a member of a conspiracy who receives a conditional judicial pardon in return for their deposition in court.

On this day Ashfaq shared the full extent of the conspiracy with the investigating officer. Stating that as a result of earlier anti-Muslim riots in which the mother of one of the accused had been killed and another of the accused lost his taxi they were singled out by agents of the Pakistani ISI and radicalized. In a trial run with a home made

²⁵³ A panchnama is a piece of paper on which the police have to get five citizen signatures for their taking of evidence. It is a mechanism to prevent the manufacturing of evidence.

explosive device in 1997, one member of the conspiracy had been severely injured when an explosion was triggered when they attempted to fit the timer to the bomb in the toilet of the Jama Masjid. Following this failed attempt and with support from two or three mysterious individuals from Pakistan, a series of bomb blasts was planned for the following year, with the aim of causing maximum disruption through the targeting of the railway lines. According to the investigating officer, Ashfaque stated this and implicated another 12 individuals, including his brother Aftab (Accused No. 1), in the conspiracy. Following this lead the police went to Aftab's house and recovered some yellow/white liquid and some white powder. According to the chemical analysis undertaken later, these were components for gunpowder and could have been, although not conclusively, the components of the bombs used in the blasts.

So far the prosecution story of what Ashfaque allegedly said. However none of this would have been technically admissible in court because Ashfaque revoked his confession. Once out of police custody and in judicial custody he withdrew his confession losing his conditional pardon and being tried in a separate case (643-B of 1998). As a result, the validity of Ashfaque's testimony becomes questionable. However even inadmissible confessions can be used if they led to a recovery. For example if an accused makes a confession which leads to the recovery of the murder weapon the part of the confession relating to that recovery is admissible in Court even if procedure was not followed in obtaining it. In the case of Ashfaque however the key narrative provided by him is not supported by substantial other facts. Apart from the findings at his brother's house, the implication of the other 12 individuals has only a very tenuous basis as without the confession it rests solely on Sanjay's testimony which we will encounter below. However the court does not allow this to destabilize the choreography of the TCA. The chain of reference is maintained functional by short-circuiting the detour expected from the slow passage of law into a shortcut that connects event and person without stable vincula to a body of texts.

The confession contains the only concrete trace of ISI involvement in the incident. The Pakistan angle is of continuous relevance in the narrative of the case and crucial to the stabilization of the accused as terrorist. However the evidentiary value of the confession was questionable even before its retraction. It was made in a state of absolute vulnerability, without a lawyer (which is not unusual in India). Only 24 hours after losing his legs in an explosion, being in hospital presumably shortly after undergoing major surgery, under medication, it is hard to imagine a more vulnerable and less reliable state. In practice the retracted confession has an afterlife that makes its influence tenacious. While the parts of the confession not relating to the recovery have no further legal validity in court, the narrative of Pakistan's involvement continues to form a stabilised pillar on which the prosecution and the judge rely extensively. The judgment continues to take Pakistan's involvement for granted although there is no evidence outside of this confession. However because the confession is not technically admissible, there is no cross-examination of Ashphaque, and not even a critical discussion of the validity of this piece of evidence. The confession remains a stable anchoring point for other stabilisations while not being admissible itself. This gives it a status outside of technical legality, making it immune to destabilizing efforts of the defence causing the discussion around it to be extremely limited. Despite the lack of technical legal connection to the TCA, the narrative remains as the scaffold for the other stabilizing efforts of the prosecution. The retraced confession is a powerful stabilizing tool for the choreography of Aftab as terrorist.

7.5.2 The Witnesses and the Motive – Star Witness Sanjay and the Suspicious Meeting

Witness testimony constitutes the bulk of the evidence presented at the Trial Court. They are therefore also the primary mechanism by which the terrorist facts are articulated in the chain of reference. Vincula are created which connect the event of a person speaking before the court to bodies of texts. These small chains of reference which have to pass through trials of strength in court, incorporated

into the larger chain of reference which articulates the terrorist fact through the TCA. As we saw above, the role of the Trial Court in the initial translation of the case is pivotal. The interaction between the witnesses and the court is of particular importance, as it is the process in which the vincula are crafted that tie a layperson's statement into the TCA and into the chain of reference.

Contrary to my expectations my experience in India indicated that the witness statement is rarely taken down verbatim and that at the very least pauses, grammatical incongruences and aborted sentences are edited out. Rather, as observed on different occasions at the lower courts during my fieldwork, the witness tells a story usually in the language they feel most comfortable in, and the judge simultaneously translates that story for the record. However, this process of translation does not take place in isolation. The witness recounts their story in for example Marathi and the Judge dictates his English translation of what is being said to the court scribe who inscribes it into the record. At the same time both the prosecution and the defence are arguing with the judge about some key words in the translation. This prompts the witness to repeat himself or herself in a slightly different manner, or encourages the judge to pose a question to the witness.²⁵⁴ In addition to the cacophony of voices playing into the translation, the court scribe also plays a pivotal role with a number of transcription errors. Finally, the level of trust extended to individual witnesses ends up being a discretionary decision of the judge.

In the Aftab TCA, the decision making aspect of the court was structured into two separate tasks. Firstly, the Court needed to decide whether or not an offence actually took place. Secondly it needed to determine if the accused brought to the Court are the ones who committed it beyond reasonable doubt. It is usually the role of magistrates to weed out cases where no criminal offence has taken

²⁵⁴ A hugely fascinating account of a similar process of hashing out evidence is analyzed and brought out by Thomas Scheffer in relation to the English crown courts. (Scheffer 2007)

place before they are brought to court. In this particular case, the prosecution directed a lot of the effort at proving that the actual incident did take place. It is only once this has been established at length that the prosecution turned to proving that the accused brought forward are actually the ones who committed the offences. This leads to a situation where at face value there are a lot of witnesses and a lot of evidence. There are 43 prosecution witnesses in total. However, only a small handful of those relate to the connection between the incident and the accused. In this particular case, the Sessions Court goes into whether or not the offence took place in some depth.

The making of the specific accused into terrorists takes place in only three stabilization moves, the most important one of which uses Sanjay's testimony. The majority of the courts work stabilizes a particular narrative of the incidents using legal procedures and exhaustive proof, the casting of the accused as terrorist is comparatively more limited. The making of the TCA is in the foreground and the making of the terrorist then becomes what emerges out of the TCA.

The second issue that arose repeatedly during my fieldwork is that of 'got up' witnesses. Which refers to a witness that is not genuine.²⁵⁵ While I regularly encountered allegations of coaching, fabricating and inducing witnesses during my interviews, the court accepts witnesses with a great willingness to follow their account at face value, crafting it into the chain of reference. It is difficult to critique the court for accepting the word of a witness in good faith, as a presumption of honesty is just as fundamental to the operation of justice as that of innocence. Yet, this stands in contrast to the importance of giving credence to the widespread claims about the endemic corruption in the prosecution and police. As well as the significant numbers of cases where witness coaching and evidence tampering are discovered.

²⁵⁵ This is something hugely interesting, all witness testimonials are artificial, but somehow the line is drawn somewhere and arguments are made over when a witness is genuine or not.

Ultimately this leaves the decision of whether or not to trust a witness in the hands of the Judge who may or may not feel a professional obligation of giving witnesses the benefit of the doubt. This of course makes the role of the defence attorney even more important, as it becomes their obligation to highlight lacunae and to confront the judge with potential contradictions and irregularities in the evidence. The adversarial system, per default, favours the stabilization efforts of the prosecution if the defence is passive.²⁵⁶ A weak defence at the lowest court not only contributes to the uncritical acceptance of witnesses by the court, but it also helps conceal some significant contradictions. Finally, the overall number of witnesses and the amount of evidence is unequally distributed between the establishing of the legal facts, and the establishing of culpability. There are two conjoined problems here. Firstly, evidence is mainly taken at the lowest court, which means that when cases move up for appeal very little new evidence is taken up by the High Court and the Supreme Court extremely rarely looks at anything new. Secondly, it is a fine balance between giving the benefit of the doubt to ordinary citizens who come in to the court to give evidence and accusing the prosecution of manufacturing evidence and witnesses. Ultimately, it is quite clear that the prosecution takes the path of least resistance, because even if an accused is lucky enough to have a good defence lawyer at the Sessions Court level, the traces relating to the incident are rarely disputed. This means that for the first year or so of the trial, the defence will be coming in, but rarely protesting anything, as the prosecution only establishes the incident.

The laying of the facts and the establishing of the 'objective' narrative of the incidents is crucial in forming the TCA. The judge accepts the prosecution's word unchallenged, as the defence will only be in attendance, without challenging much of what is being put before the

²⁵⁶ The adversarial system uses the Judge as an independent arbiter between the arguments made by two adversarial parties, it is the predominant mode in anglo saxon legal systems whereas the inquisitorial model, with a proactive judge is better established in legal systems influenced by French or German law.

bench. This allows the prosecution to set up and stabilize connections that have the capacity to interact with the accused. The TCA emerges and desires, in the Deleuzian sense, a terrorist. Of course there is rarely a point (from the lawyers point of view when operating with very limited resources) in challenging the material facts of the case. But this procedure, of focusing very lengthily on the facts of the case, leads the judge to become a part of the TCA and particular circulations becoming territorialised. It is then after months of quiet acquiescence to the prosecution story that the defence all of a sudden wakes up for the last two or three witnesses and tries to do cross examinations. However, the momentum of the TCA favours the prosecution and actors are articulated as part of the TCA engaging in its maintenance. This is illustrated for example by the common practice to concentrate the most strenuous efforts of the defence during the cross examination of the witnesses establishing the guilt of their clients. All the while, the most strenuous efforts, at least in sheer amounts of evidence presented, by the prosecution goes into the establishing that bomb blasts did take place. The sequencing of the two works as follows. First the prosecution builds up the factual basis for the events. This is then in a second step underpinned by a few crucial witnesses to establish the link. The weighting seems to suggest, if not a prioritisation, then at the very least a difference of accessibility of materials. This weighting of the establishing of the facts versus the establishing of the responsibility, has a number of dimensions. On the one hand, the argument could be made that this is merely a coincidental temporal sequencing that leads to the majority of the effort being expended in the proving of the occurrence. On the other hand, one could argue that since criminals are by definition clandestine, it would only be normal that more evidence exists of the results of their actions than of the planning and conceptional stages of the crime. Without the need to dismiss either of these possible explanations, the establishment of the TCA, through the focus on the official narrative of the incidents, sets the machinery for the making of a terrorist in motion.

Therefore as the incident becomes stabilized as terrorism the accused are articulated as terrorist almost by extension. Intentionality is not as important as the consequences that include the establishing of a pattern of circulations. In this pattern the judges routinely subscribe to the story presented to them and follow the stabilizing efforts of the prosecution along the wide avenue of establishing facts.

Returning to the issue of witnesses at the trial court we have seen that it is a double-edged sword. On the one hand, there is a high chance, and regular exposures lead to this conclusion, that corruption is widespread and many witnesses are coached, intimidated or fully made up, or made a 'got up witness' in Indian Court vernacular (Verma 1999; Rao 1997; Morrison 1974; Jaffrelot 2002; Fletcher and Sarkar 2007). On the other hand, the inherent distrust of the population towards the police, the extremely high risk of abuse when entering the police station even as a witness coming forward, leads to a scenario where very few people would actually volunteer to give evidence. In this particular case the depositions of witnesses aimed at establishing guilt, as recorded in the statements, were qualitatively different from the first batch of fact-establishing witnesses. As there also is a socio-economic dimension to this, while the first batch of witnesses, those relating to the proof of an actual incident were made up exogenously to the police practices and choices, in the sense that they were not people that the individual investigating officers would decide to bring in for questioning, but that would be made necessary to question through the exogenous facts of the case - were generally of a more affluent group than the ones brought in at the police's initiative. While it is beyond the scope of this thesis to make an argument that goes beyond the cases at hand, it is possible that this is a result of the deeply enshrined distaste for participating in legal proceedings exhibited by the upper classes during colonial times discussed at length by Singha (Singha 1998). This goes so far that, although this is contrary to established procedure, the chemical expert who was in charge of the report on the recovered substances, was not brought in at all. These occurrences are a function of the

police's role in society, where it is very difficult for them to exert influence over those who are well connected, affluent, educated, or in other words part of the newly powerful middle class. It is much easier for the police to bring in witnesses from an economically depressed area (Zoopadpati), not least because witnesses with a lower educational background are more likely to be susceptible to the police's arsenal of threats and inducements. Not only are professionals better placed to resist being intimidated by the machinery of the state, but they are also more likely to successfully balk at the erroneous strain involved in participating in any trial before a Sessions Court. It is near impossible to exactly schedule the time and date of a deposition, and it is more likely than not to be changed repeatedly at the last minute causing a number of days of work to be missed, even for those who only depose as a witness. This is part of the character of the legal system under observation, which makes any interaction with it for lay people a tenuous exercise in patience and humility.

Returning to the Aftab TCA, ultimately the conviction and the prosecution's case hinge on the testimony of one key witness. Sanjay Chouhan (PW 42) somewhat mysteriously shows up at the last minute of the trial and is deposed as the very last prosecution witness. He gives a very long and elaborate, although at times ambiguous, testimony. The court decides to take his story at face value. The story Sanjay puts in front of the court brings all the accused together at one meeting of minds. According to his statement, PW42 worked as a tailor for Accused No. 1, Aftab. In late 1997 he was working late one day and saw a group of people sitting together on a Nallah (Drain pipe) outside their house/store in one of the more economically depressed areas of Mumbai. In passing, he heard one of the accused say that "the mistakes of the Jama Masjid should not be repeated" and that this time they should target something like train platforms to cause maximum disruption. When it was discovered that PW42 was listening, one of the accused, Yassinbhai, put his scissors to PW42's neck and told him that he would be killed if he spoke to anybody

about the incident. Aftab subsequently fired PW42 from his tailoring job. According to PW42, he did not think anything of the incident at the time, and when he spoke to his two roommates, they told him to shut up and not talk about it. He then went to his village, and when he returned, found casual employment somewhere else. Only following the bomb blasts did he think of the incident at the Nallah again, and somehow found his way to the police and into the court. However, how exactly he made his way to court remains unclear. Further, PW42 did not identify all accused to actually have been there at the Nallah, nor is he able to determine who was speaking and if there was acquiescence, disagreement or discussion. Nevertheless, both the investigating agency, the prosecution and ultimately the court accepted this as “the meeting of minds” required for a conspiracy. The court decides that according to the standards of evidence, which boil down to whether or not a prudent person would believe the witness, PW42 is trustworthy. It is in this sense that PW42 makes the crucial connection for the TCA between the incidents, the accused and the terrorist motive. His story essentially testified to the veracity of the prosecution version of events.

However, there are still certain doubts remaining from the perspective of the defence. Firstly, according to his testimony PW42 owed money to Accused Number One (A1) for a sewing machine he bought from him a little while back. Secondly, PW42 was fired by A1. Moreover, at the time, PW42 did not find the meeting particularly remarkable. Finally, none of the people he allegedly spoke to about the events of the night were produced before the court, even though this would have been easy for the prosecution, presumably, to produce his former roommates and to have them corroborate this part of PW42’s story. Although none of the remaining doubts about PW42 in themselves would be enough to fully discredit his story, there remain a number of questions regarding his inability to identify all the attendants at the meeting by the Nallah; he was unable to positively identify who was talking, he only overheard snippets and according to his own statement, about a third of the attendants had

their backs to him. Together with his fortuitous appearance in the final stages of the trial, the question remained amongst the lawyers whether this testimony in itself was enough for the harsh sentences handed down to all the accused. While this question remains open, it is clear that Sanjay Chouhan is of fundamental importance to the stabilization of the connection between the accused, the incidents and the TCA. It is his testimony that stabilizes the relation between the terrorist motive, the accused and the incident.

7.5.3 TIPs and Connections between Witnesses, Incidents and Accused

Throughout the process a number of Test Identification Parades (TIPs) have allegedly taken place. While TIPs are generally not considered to be very strong pieces of evidence they serve a very specific purpose. Through a TIP, stabilization is attempted in the relation between two persons and an incident. Additionally, a legal procedure exists, which prescribes how the TIP has to be conducted to be legally valid. If an identification takes place, the TIP becomes inscribed into a piece of paper that can be transported to the court and aid the prosecution in their wider stabilization effort. Even when a TIP has been successful in stabilizing a connection between the witness, the events they narrate and the accused, repetition of the identification in open court is routine. Yet, in my relatively short fieldwork I witnessed police attempting to ‘aid’ witnesses in identifying accused as the ones they saw. TIPs therefore suffer from the same risks as witnesses in that the prosecution and police can influence them. In the Aftab TCA, there was one instance where a TIPs was allegedly undertaken in Mohar Jail, but the witness was unable to identify the same accused in open court. In another instance, there were two different TIPs conducted with the same witness who was asked to identify someone they had seen. However the witness identified a different person in each TIP. Of course all of these failings of memory can take place without tampering. However, other irregularities with the Panchnama in the TIPs and the frequent disregard for proper procedures during the TIP problematize them as

an effective tool for stabilization. Perhaps this is can explain why they so often fail.

The strength of connections stabilized by identification in open court are also weakened by the allegation made by one of the accused that directly before the court hearing he was identified to a witness.²⁵⁷ A further example of how this seems to be a common practice is from my own observation during fieldwork. On the 27th of March 2013 I was at the Tiz Hazari Court in Old Delhi. The court was hearing witnesses for the 2008 Delhi Rickshaw Bombings. One of these witnesses was asked by the court to identify a specific accused he had seen fiddling with a dumpster that subsequently exploded. The witness raised his hand and let it trail over the chairs in the back of the room where all the accused were sitting. Hidden from the judge but in plain sight from my position (the only spectator) and the defence attorneys, the prosecutor stepped onto the witness's foot. At this point the witness stopped and said, this is the person I saw putting something into the dumpster. In this particular case the identification was accepted by the judge despite the outcry and protest of the group of defence attorneys.

The three stabilizations we have seen in this section are made to last by inscription into the judgment. This inscription not only makes them more lasting but also allows them to travel reinforcing the chain of reference which articulates the terrorist fact through the courts. Ultimately however its most important property is that it suppresses the precariousness of the steps of stabilization.

7.6 The Judgments as Mediators

The stabilising steps come together and the terrorist is stabilised most effectively in the inscription of the judgment. This stabilisation is very effective, because it is presented in a format that puts it into relation with the overall judicial system. But the format of the judgment also suppresses the traces of precariousness encountered in the step-by-

²⁵⁷ This was not recorded by the court but discussions about how to make the court take notice of this were on going during my participant observation.

step stabilisations before. The artefacts of the stabilisations encountered before are inscribed into the judgment as discovered facts. The inscribed judgment also becomes mobile, transporting its inscription from one court to the next and one context to another. It does so not as an intermediary, faithfully interacting in the same way every time, but as a mediator changing how it fits into new contexts dynamically. The same judgment can interact with different courts, with scholars and reports, defenders of security and champions of law and order. But perhaps more importantly within the TCA the judgment interacts differently with the accused/convicted, the prison authorities and the appeals lawyers. The judgment as mediator can travel up the ladder of appeal. In the Aftab TCA it travels from the Sessions Court to the High Court and from there to the Supreme Court.

7.6.1 Percolating Up – Sessions Court, High Court, Supreme Court

In each of these courts the TCA changes slightly. Changing actants, new Judges and lawyers influence this change. The chain of reference articulated in at the first instance is transported to the next court via the judgment and is rearticulated there increasingly suppressing the shortcuts which went into its original production. The role of the Court in the wider legal structure also slightly changes from Sessions Court, to High Court to Supreme Court. An increasing focus on legal deliberation disassociates and suppresses the security modalities visible in the sessions court, increasingly the slow, detoured and deliberately hesitant passage of law takes over centre stage.

7.6.1.1 The Sessions Court

Sessions Courts bear the brunt of the work within the criminal legal system. They are the ones who hear the vast majority of cases. Contrary to the predilections of many lawyers, they are also the end of the line for the vast majority of accused. Terrorism related cases are special in this regard, because they rarely stop at the Sessions Court. Appeals for high profile cases are the norm. Firstly, this is

because of the stiff penalties involved; there is a mandatory high court review for all death sentences. Secondly, these cases also enthuse lawyers, human rights groups and the public interest, making appeals far more likely than in crimes with less widespread emotional appeal. Therefore, despite the fundamental role of the Sessions Court, there is the inherent ambivalence in terrorism cases that the Court has to assume that the case will not stop here. Further, many accused and many lawyers assume that the court will reach a higher forum. Therefore, they essentially wait for this higher forum to get out the “big guns” or the high profile lawyers. The Sessions Court is both of absolutely fundamental importance to a case and is regarded with contempt by many lawyers of the higher courts.

This ambivalence, of importance and neglect, reinforces the importance of the Sessions Courts in establishing the basis of the TCA. The Sessions Court is also the locus for the admission of evidence into the trial. In other words, nearly all the evidence that is used during a trial is entered during the Sessions Court phase. Later admission of evidence at the High Court level is possible, albeit very rare. Finally, the chances of successfully submitting new evidence to the Supreme Court are very slim in the absence of ground breaking new developments or gross malpractice. Most importantly it is almost certain that no re-examination of evidence submitted at the Sessions Court will be permitted. If a cross examination has been done in a mediocre manner at the Sessions Court, it will be near impossible to call this witness back at a higher instance. Systemically this makes sense, as the higher courts cannot become the primary locus of trials without defeating the entire purpose of a three-tiered judicial apparatus. However, this also means that if the defence was not operating optimally at the first instance, this will continue to hamper subsequent attempts at defending the accused throughout the second and third tiers. Finally, it means that something different is happening between the TCA-Sessions Court and the TCA-High Court/Supreme Court. To follow the terrorist in the making through the process, I treat them as three modes or phases of the same assemblage.

Different actants come together to get to work on the same person, making the terrorist facts speak, first at the trial Court then at the High Court and finally at the Supreme Court.

The TCA during the Trial Court mode sets the standard, the initial trajectory, according to which the rest of the trial proceeds. Laying out both the evidence and the narrative from which the appeals then must make an effort to differ. The lack of resources at the initial stages of the trial in combination with the disdain many lawyers have towards the lower courts overshadows the fundamental part these courts have to play in the overall process.

7.6.1.2 The High Court

A few things change at the High Court, but what takes place is mainly stabilization through re-iteration. The Session's Court judgment has acted as a mediator and the TCA reconfigures around the locus of the High Court. This reconfiguration goes hand in hand with a number of new actants. For example the appeal gains a new case reference: Criminal Appeal No. 1324 of 2004. This ties it into a new reporting structure which allows the judgment to travel farther. It now becomes accessible over the High Courts website. This wider availability increases the reach of the stabilization as well as the affects, abilities to interact and be interacted with, of the judgment.

The judgment's scope also becomes more focused as two of the original accused play no part any longer.²⁵⁸ The TCA becomes more

²⁵⁸ (No.1 Aftab Saeed Ahmed Shaikh; No.2 Asgar Kadar Shaikh; No.3 Afzal Abdul Hamid Khan; No.4 Mohammed Iqbal Mohammed Hanif Shaikh; No.5 Sayyed Kadir Mohammed Shafi Sayyed; No.6 Sahid Khalil Ansari; No.7 Farooque Mohammed Yusuf Shaikh; No.8 Mohammed Yaqub Abdul Majid Nagul) The appeal is joined with Criminal Appeal No. 1059 of 2004 regarding Mohammed Sagir Mohammed Bashir Chauhan (Accused No. 8 In the sessions court judgment); Criminal Appeal No. 1520 of 2004 regarding Javed Gulam Hussain Shah (Original Accused No.9) as well as Criminal Appeal No. 951 of 2004 regarding Jaffar Abdul Haque Shaikh (Original Accused No.5) and Criminal Appeal No. 1168 of 2012 regarding Farooque Mohammed Yusuf Shaikh (Original Accused No. 12).

consolidated and the number of terrorists to be stabilized becomes smaller. Accused No. 1-9, as well as accused No. 12 and 13 of the original Trial have appealed against the Sessions Court Judgment. Accused No. 10 did not appeal to the High Court, because his sentence consisted of acquittal and subsequent deportation to Pakistan. By the time of appeal he had already been deported. Accused No. 11 passed away during the process of the Sessions Court trial. Therefore, the trial against him stood abated. That everybody else chose to appeal shows the significance of the High Court in the TCA. For the accused it is the only chance to challenge and destabilize their status as terrorist. Within the TCA it however also permits the reinforcing of the choreography already underway from the Sessions Court. Throughout the High Court judgment the narrative from the Sessions Court is picked up and reiterated eliminating some controversy except in respect of accused No 7. Who after reviewing the evidence and judging it weak is acquitted by the High Court. During the proceedings at the High Court two more of the accused, no. 3 and no. 6 have passed away. Ultimately therefore the prosecution narrative at the High Court is whittled down to the core group of Accused Nos. 1, 2, 4, 5, 8, 9 and 12. Accused No 13 is acquitted for offences relating to the bomb blast at the Jama Masjid but his conviction upheld on all other grounds. The stabilization now excludes the Jama Masjid completely as all charges relating to the Jama Masjid bombing have been overturned. This is of particular relevance to the choreography. Despite the Jama Masjid blast featuring prominently in the prosecution timeline establishing the terrorist conspiracy it has now almost completely disappeared from the judgment. The High Court focuses instead on the core stabilisations surrounding the two eyewitnesses: Bharat and Sanjay. This means that we can observe a trend where contentious pieces of evidence, weakly stabilized connections are edited out of the judgment. At the same time in the previous judgment these weak connections were necessary to hold together the stabilization of what later on emerges as strong connections. More explicitly, the

conviction of accused 7 and 13 for the Jama Masjid blast is essential for corroborating the reference to the Jama Masjid in Sanjay's account. That the convictions in relation to the Jama Masjid at the High Court are overturned, has by this point become insulated from the trustworthiness of Sanjay. The terrorist stabilization emerges like a building from its scaffolding, increasingly able to stand on its own. The last opportunity for the defence to challenge this stabilization before the TCA becomes closed and the judgment ultimately inscribed is at the Supreme Court.

7.6.1.3 Preparing for the Supreme Court

In this case I was involved in drafting the SLP, which was then submitted to the Supreme Court for consideration. At the time of writing the SLP has been accepted but the criminal appeal is still pending before the Supreme Court. As part of my Participant Observation, I helped Ms Ria Singh Sawhney to draft the Special Leave Petition (SLP) for this particular case and the three appeals handled by Ms Ramakrishnan in regards to Accused No.1, No.2 and No.8. Before the highest tier of the judicial system takes up a case, the Supreme Court needs to be petitioned for the right, or leave, to appeal the High Court Judgment.

An SLP is a curious actant in the TCA. It needs to frame the points that the appealing party would like to have impugned by the Supreme Court in language that highlights fundamental questions of law. In other words, for the Supreme Court to take interest, the particular issues have to be framed so as to have a wider relevance, beyond the single case. Therefore, we are confronted with a mode of the TCA where the previously destabilizing defence is required to engage in a sanitizing effort. In other words, by the time a TCA gravitates to the Supreme Court it is firmly territorialized by the pre-existing legal assemblage. The arguments that have to be made in the SLP no longer involve the tensions between incident and pre-existing legal assemblage but focus on the tension arising between the specific TCA and the wider pre-existing legal assemblage. The lawyers petitioning the Supreme Court need to show how part of the

stabilization runs counter to a previously passed judgment, law or the constitution. This broader outlook by necessity involves the defence in drafting the appeal in such a way that the details and contradictions of previous stabilizations are suppressed. By tying the case at hand into wider questions of law, the specifics are necessarily edited out for the benefit of making connections to a whole network of laws and precedents as well as the constitution. The Supreme Court then hears the SLP and decides if the appeal is allowed to go ahead on those issues or not. Hence, it is of utmost importance to phrase these issues as broadly as possible *and* to make them acutely relevant to the broader judicial field. At the same time the drafters of the SLP need to include all potentially interesting points that could be argued before the court later. Layered on top of this is the considerable amount of paperwork that is amassed by the TCA up to this point. The lawyers drafting the SLP have to read, understand and keep in mind the information that is mediated to them through all the inscriptions undertaken in the two other modes of the TCA.

All in all, without taking into account potentially interesting and relevant jurisprudence, the case file in this particular case was over 2500 pages, in 2 files and 11 folders. These included the two judgments, the records of all the witness depositions, the expert reports, records of injunctions, petitions and other court proceedings, and the statements made by the accused. Further difficulties were added by the often-confusing organisation of the files. This highlighted the paramount importance of the role office staff play in the TCA. Keeping track of files, organising them and making sure nothing is dropped becomes as important to the stabilizing/destabilizing efforts as technical knowledge of the law. When dealing with these volumes of information, a piece of paper falling under the table could be of vital importance and easily missed. In addition, there were irregularities with the listing of pieces of evidence. The index, the language of reports, judgments and witness depositions were often marred by poor language leaving grammatical ambiguities and substantial spelling mistakes. This links back to the

process of translation/inscription and illustrates further what a critical process this is in the early TCA. It was the sheer importance of these documents that prompted Ms Ramakrishnan to always insist on one of the junior lawyers staying behind and to check that the record would be kept accurately. He/she would then leave the room only after ensuring that the record was sealed without being tampered with by the prosecution; something that apparently happens with some frequency.

Finally, despite repeated requests, soft copies, of the judgments were only made available after weeks into the process, making searching for particular witness statements, etc. all the more difficult. Carefully combing through all the materials to really understand the case takes the hardworking lawyer days. Even with additional staff, it is simply astonishing how judges are meant to be able to really understand a case coming to them for appeals within hours, if not minutes. It seems highly likely that judges at the higher courts, are unable to look at much more than the judgments of the lower courts and the petitions made before them when sitting on an appeal. To go through the evidence would not only be redundant but purely impossible from a practical perspective. However, this makes the mediating function of the judgment(s) all the more important. In my experience of the courts, the record is always something negotiated, something that does not reflect all that is happening, but rather reflects what the judge ultimately sets as the final version of events. This translation through mediation demonstrates again how important the early trajectory of the TCA is. Many lawyers believe that the trial courts are only a hurdle to be taken before real arguments being made at the High Court or the Supreme Court. However the early translations and the actants introduced early on into the TCA are very difficult to supplant. Arguments in the upper two tiers are limited by the evidence and the record introduced and made at the Sessions Court.

7.6.2 The Roles of Prosecution, Judge and Defence

The prosecution and defence play a crucial role in the TCA. It is the tension between these two actors through which other actants are

leave their trace on the TCA or don't. The judge in turn is the choreographer whose efforts ensure that the TCA does not fall apart and that what it produces remains coherent with the pre-existing legal assemblage and balanced with the pre-existing security assemblage. In their interactions these three actors, or rather classes of actors, also provide the work that goes into the stabilisation of the terrorist. Because of this they are also ambiguous actors, their actions contribute to the continued existence of the TCA but they are also trying to influence territorialisations and stabilisations.

7.6.2.1 Prosecution

The role of the prosecution in the TCA is an ambiguous one for two reasons. Firstly, similar to other parts of the judicial system, the prosecution in India is underfunded and stripped of even the most essential resources, maybe even worse. Secondly, the role of the prosecution in common law systems is an inherently ambiguous one. All advocates are in the court with the primary obligation to help the judge reach an informed decision. However, the vested interest of the parties is inherent in the adversarial system and enshrined in the *modus operandi*. This interest is reinforced by the most common measure of success for a prosecutor being their conviction rates. In other words, despite their obligations to the court and the judicial system as a whole, the prosecution is bound to end up on the side favouring stabilization of the terrorist along with the investigating organs pushing for a conviction.

Thirdly, in addition to public pressure, there is political pressure on the prosecution. This is partly caused by proximity between the states lawyers and the investigating and enforcing agents that are part of the government. The cooperation between the prosecution and the investigating agencies is what brings forward potential actants for the stabilization of the accused as terrorist. It is more or less the investigating agencies that are in charge of bringing those actants to the TCA and the prosecution, which then proposes a translation and connection to the court. The court then either inscribes that translation or changes it. However, in this process all that is not

connected stays vacant. This means that there remains a plethora of potential connections, virtual in the Deleuzian sense, which are never concretely brought into the TCA. One such unmade connection could have served to corroborate Sanjay's statement about telling the night's events to his two flat mates.²⁵⁹ Sanjay mentions that after overhearing the alleged conspiracy, he discussed the events with his co-workers. This came out in cross-examination, but no effort has been made by either the prosecution or the defence to locate his co-workers stabilize or destabilize his account. The absence of work from an actor can also contribute to stabilization; or rather avoid destabilizing connections being made.

7.6.2.2 Judge

The role of the judge in the TCA is another element of ambiguity. Generally understood in adversarial legal systems the judge is the neutral arbiter between the two parties arguing (Jonathan Law 2015). The role of the judge is then to preside over proceedings and to hear the evidence, to apply their mind and their discretion in order to adjudicate. However, in the Aftab TCA, the Sessions Court judge acted to expand upon the prosecution's story, to include unsubstantiated allegations into the wider narrative, taking the lack of protest from the defence as enough evidence in favour of following a particular line of reasoning. While we cannot necessarily deduce from this that this is the norm, the judge is clearly more involved in the TCA than the role of the neutral arbiter would suggest. Judges, and this is especially true at the Special Courts, and prosecutors are both key repeat players. They generally have a professional relationship that extends beyond the matter at hand. This potentially blurs the line between TCAs and therefore makes it difficult to regard matters on an exclusively case-by-case basis. Furthermore, as I picked up during my participant observation, this difficulty makes it unlikely for the judge to rigorously apply procedural law in every case that would go against the investigating agencies, as this could cause serious obstacles

²⁵⁹ See for example p.30 of the High Court Judgment.

for them in the future.²⁶⁰ On one hand stretching cases over even longer periods and on the other hand forcing the judges to throw out a number of cases out of hand on procedural grounds.

7.6.2.3 Defence

There are uncountable numbers of potential defence lawyers in India. However, in TCAs this number is often drastically reduced for the following reasons. Firstly, there is a small pool of lawyers whose proved record of competence makes them the primary choice for such cases, if they can be convinced to take them. Secondly, in cases where the word terrorism is flying around early on and tempers are high, Indian bar associations frequently encourage their members not to defend the terrorist.²⁶¹ The strategy chosen by the defending lawyer at the trial court has a fundamental impact on the trial, as it is in the trial court that evidence has to be questioned, its stabilisations resisted and translations/inscriptions influenced.

There are frequently as many defending lawyers as there are accused. This makes sense, both from a judicial and a common sense point of view. It is important for each accused to be defended to the best in their own right. Furthermore, if there is a lawyer for each accused then nothing really ties the accused together, except the allegations of the prosecution. However, despite its advantages, this scattering also poses a problem, not only in terms of expended resources and efficiency, but also in terms of strategy and joint planning. During my time observing the case there were no lawyer to lawyer contacts with either the lawyers who represented the clients previously at other courts or the lawyers who were in charge of the other SLP's. This lack of communication is to such an extent that, while I am not sure if Ms Ramakrishnan was aware of other appeals, the other lawyers could not tell me if there were appeals filed by the accused not represented by her.

²⁶⁰ Interview XLII, Fieldwork II.

²⁶¹ For example in the case of Afzal Guru see various contributors in (Roy 2006).

At the Sessions Court stage, what was visible from the work of the defending lawyers was absolutely minimal. There was very little effective cross-examination and many questionable pieces of evidence were not challenged. This posed a problem in the second and third tier of the TCA, because one then needs an additional reason to challenge them and to explain why they were not challenged before. Additionally, while the closing arguments on behalf of the accused were not recorded, it is at the discretion of the court whether or not to include these in the record. Therefore it is potentially impossible to positively ascertain what was being said and if the defence effectively challenged the prosecution narrative.

Furthermore, the adversarial style of holding court makes a creative and proactive defence paramount to success. In theory the principle of *in dubio pro reo* would be sufficient to ensure that stonewalling by the defence could work in the light of an imperfect prosecution.²⁶² However it is increasingly becoming clear, in this case and others, that the judge is more sympathetic to the difficulties of the prosecution and investigating agencies than to the ones of the defence. An active defence is therefore crucial from the outset. While the resources of the defending lawyers are extremely limited, it is interesting to note that in the Aftab TCA not a single defence witness was produced. My inquiries regarding this fact were met with a certain amount of surprise, suggesting that it is not the norm in criminal cases to produce defence witnesses. Clearly it is not the role of the defence to undertake their own investigation. However the absence of neutrality from the investigating organs and prosecutor suggest that it would only make sense for the defence to produce witnesses. Either to prove an alibi or to cast doubt on some of the more far fetched parts of the prosecution's narrative, destabilizing actants introduced by the defence are extremely rare however.

²⁶² *In dubio pro reo* can be roughly translated as in case of doubt, favour the accused and is one of the basic principles of law. For example it is recognized as a basic human right by the Indian Supreme Court in *Narendra Singh & Anr vs State of M.P*, Criminal Appeal 298 of 1997 (2004).

Further there is no guarantee that such a strategy would be successful, or even be permitted by the judge. However, it is clear that the current strategy of denying everything short of the validity of the trial itself, without proactive involvement is not the most effective destabilization.²⁶³

One would have to consider the consequences of the defence bringing their own set of evidence, witnesses and narrative to the table. On the one hand, it could level the playing field and help the accused. On the other hand, it may very well serve to advance and legitimise the undermining of the presumption of innocence if it became common practice for accused to have to provide a plausible alternative explanation of events. These risks stand opposed to the risk of allowing the judge to be confronted for years with only the version of events presented by the prosecution. Such deep immersion in their thinking and narrative, can cause a certain susceptibility to their way of thinking. While wrapping my head around the work going into the SLP's, I found it difficult to keep all facts in my head without linking them with some kind of narrative. Even accounting for a more practiced judicial mind of a judge, the fact load of such a case is simply overwhelming, and the appeal of a narrative to fit it all together and to disregard some bits while highlighting others is very strong.

The defence strategy at the Sessions Court according to the High Court consists of a mixture of stonewalling and attempted discrediting of witnesses, such as Sanjay (PW 42). According to the defence, it is highly unlikely that a conspiracy would be hatched in so public a place as the Nallah. Sanjay was also produced and examined very late in the trial. According to the prosecution this was because his whereabouts were unknown. This defence is disregarded by the Court. This is probably because the court sees this not as something casting a doubt on the prosecution story but rather simply as the

²⁶³ The strategy of denying the validity of a tribunal is a common occurrence in war crime tribunals. See for example the chapter on the politics of truth in (Koskeniemi 2011).

choice of location for the conspiracy. The High Court also attests that they have engaged in detail with the evidence given by PW 42 to make up their own mind, and they also come to the conclusion that Sanjay is trustworthy. The cross-examination of Sanjay contributes to this conclusion. While undertaken to weaken his argument, the defence lawyers inadvertently gave him the platform to iron out weaknesses in his statement. An inexperienced cross-examination, aimed at destabilizing a circulation, in this case backfired to its opposite. This would be innocuous enough if it were not for the fact that, according to my interviews, the defence at the lower courts frequently pursues a course of action that actually weakens their clients' position.²⁶⁴ In addition there are reported cases where the accused have been cajoled by the police to stick to one particular lawyer.

The defence, the prosecution and the Judge are three of the most important classes of actors in the TCA. However their roles are far from straightforward. The Judge plays a choreographing role in ensuring that the TCA does not fall apart and stays coherent with pre-existing assemblages. The prosecution and defence are both trying to stabilize/destabilize the casting of the accused as terrorist. Roles are changing from Court to Court. Furthermore the destabilisations and stabilisations often occur unpredictably through backfiring strategies or accidental mistakes.

7.7 A Tale of Two Assemblages - Chapter Conclusion

The Aftab TCA is more complex than the Nasir TCA. Six bomb blasts occurring in 1997 and 1998 are translated and stabilised into a chain of reference which articulates Nasir and his brother Ashfaq as terrorists. The successful enrolment of Nasir as terrorist hinges on a combination of heterogeneous actants. Most important in that stabilisation are the recovery of alleged bomb materials from his house and the witness statement by Sanjay which are connected via vincula to the law of conspiracy. But the role played by the successful translation of the incident into categories from the pre-existing legal assemblage should also not be underestimated.

²⁶⁴ Interviews XLII, Fieldwork II.

One thing that is particularly striking about the Aftab TCA is how invisible the role of Aftab is. The entire assemblage has to articulate the chain of reference in order to make him speak. While he is the main object of the TCAs stabilisation and his emerging as the terrorist out of the modality of the Sessions Court, he only contributes capacities rather than action and the assemblage has to come together to make him speak. Throughout the chapter traces left by Aftab have appeared and disappeared but it is often the stabilisation of those traces that the other actors of the TCA are after. The stabilisation/destabilisations and the tensions arising between different nodes of the network take place largely between actors and actants other than the accused. Three most vocal actors engaging in providing the work for the TCA are the prosecution, judge and defence. The accused on the other hand are present and leave traces but it is their capacity to be stabilised as terrorist that they contribute. It is almost as if they are caught in the net, the nodes of which are stabilised through the TCA. Despite the final appeal for this case still pending at the Supreme Court the stabilisation of the incident as terrorist and the enrolment of Aftab and his co-accused as terrorist has already successfully taken place. In order to do so actants have come together in a choreography of circulations that has generated stability.

Chapter 8 – Conclusion

Against embattled and positional definitions of terrorism I have pushed for a concrete understanding of the terrorist as contingently stabilised. The stale definitions and pitched battles that pre-occupy so many judges and jurists, legislators and policy-makers are red herrings, distracting from the inbuilt dimensions of power and morality of the concept. No definition that does not turn to the process of stabilisation is more than one actant in a wider assemblage. By engaging with the process of stabilisation of two concrete terrorists I trace a processual understanding of terrorism through participant observation in and outside of Indian courts. Terrorist facts require the TCA in order to be made to speak. Once the terrorists are articulated by the meticulously crafted chain of reference, the layers of inscription ensure that the facts appear to speak for themselves. The TCA draws on both the slow, deliberate and hesitant passage of law and on the quick, short cut oriented, prehensile modality of security to make the terrorist speak. Vincula carefully connect insignificant events to the wider body of texts, but the individual chain link that shows the crafted chain of reference in all its artifice becomes invisible through layers of suppression.

My work is only a beginning, as it builds on the findings of seminal studies by Latour but goes beyond the passage of law to show that actors speculate about unexpected shortcuts by making reference to security. Challenges included incomplete or inaccessible records, files, evidence and actors and last but not least the limitation of time. Despite these limitations and challenges my inquiry opens opportunities for understanding that bypass the bogged down debates surrounding definitions of terrorism as jurisprudential exercises in truth finding to show the heterogeneous processes of truth making. It also goes further than the literature that looks only at common characteristics of people who have become stabilised as terrorist. Further using assemblage thinking to explore the stabilisation of the terrorist enables us to appreciate all involved actants without silencing them, while at the same time appreciating

how the stabilised terrorist herself is increasingly silenced in every aspect that is not the deed itself. That terrorism is propaganda of the deed is therefore also inbuilt into the processes that disenfranchise and silence the person as they are turned into the terrorist. All the while the terrorist facts are being made to speak. However this theoretical turn does not force us to disregard the evil of individuals who engage in the planning or perpetrating of terrifying incidents, neither are we called upon to judge professionals of the security assemblage who zealously overstep in their attempt to secure. Finally it allows us to understand the members of the legal assemblage as hard working individuals who are intensely engaged in enrolling, choreographing, stabilising or destabilising relations between actants to craft vincula and build a chain of reference. It is through these processes that we can explain surprising results, rather than to take recourse to accusations of incompetence, corruption, malevolence or conspiracy. Ultimately the stabilisation of terrorists through the courts emerges out of the interactions between actants leaving behind numerous traces, these traces however have, contrary to our deeply engrained, modern belief, no propensity to be mappable on a smooth and continuous narrative. This requires translations and stabilisation of some traces at the destabilising expense of others. The smooth narrative of the incidents is only possible once the chain of reference can be made to hold together and serves to articulate the terrorist fact.

8.1 A Summary

One of the questions with which we started this inquiry was: Why are we confronted at the same time with sayings like one man's terrorist is another man's freedom fighter and relatively stable consensus on who terrorists are? I have tried to answer this question with regard to the interplay between stability and fluidity, structures and actants, humans and non-humans. First establishing a theoretical frame and toolkit through assemblage thinking and the TCA, I have then traced these processes of stabilisation through two concrete case studies.

Throughout this thesis I have proposed and applied an assemblage thinking based approach to understanding the role courts play in stabilising individuals as terrorist. Starting from the premise that terrorists are products of working processes taking place amongst actants, I have traced these processes in the particularly coded environment of two Indian case studies. Terrorists are made to be, speak and act, by careful crafting and manipulation of a chain of reference that articulates them. To show how this chain of reference comes into existence I have used the Terror Court Assemblage that I have developed in the second chapter of the thesis. The TCA is a way of understanding the associations that form in and around a court, through a specially developed combination of tools from ANT and assemblage thinking. In addition to tracing the processes that result in a stable terrorist the TCA illustrates another aspect. Contrary to much of the literature which places both theoretical understandings of terrorism and practical responses into two opposed camps: one of security and one of law and order the TCA allows me to show that while these two approaches stand in tension with each other they are both part of the chain of reference that articulates terrorist facts. In the working TCA I have shown how these two tendencies, to understand the terrorist as pertaining to security, or to understand them as pertaining to law and order form territorialisations in the circulations that constantly churn in the assemblage.

The Terror Court Assemblage is expounded in chapter two. I propose a fusing of some of the elements of assemblages drawn from Deleuze and Guattari with the more recent ANT literature associated predominantly with Latour, Mol, McGee, Scheffer and Law. It forms the backbone of my theory and takes account of the roles played by the actants involved in the stabilisation of the terrorist in court. Through the choreographed relations that are then inscribed in the judgment a stable chain of reference emerges that suppresses the heterogeneity and messiness of the traces found before.

This theoretical model is explored further with reference to other theoretical approaches to the relation between security, law and

terrorism. However in this context it is important that I come to the conclusion that assemblages are best suited to the incorporation of various theoretical approaches. In other words the role of these theoretical accounts can be incorporated in the making of terrorists within the assemblage approach. Assemblage thinking has deep reaching implications for the method that we can follow to gain insights. The focus here is on the tracing of actants. This is discussed in more detail in the methods chapter, after all this is first and foremost a fieldwork driven work. The fifth chapter draws on my interviews to explore the messy face of multitudes of associations that contrast so strongly with the smooth account of the terrorist emerging out of the TCA. It is in this chapter that the actors interviewed speculate on the tensions between shortcuts and detours in the crafting of the chain of reference.

Subsequently I trace the stabilisation of Nasir and the chain of reference that articulates him and his associates as terrorists. They are made to speak through the complex interplay of legal and security actants. To trace these actants I draw on my participant observation at the Supreme Court stage of his appeal as well as the un-reported judgment of the Sessions Court and the publicly available judgment of the High Court. The Nasir TCA shows the stabilisations going into the making of terrorists, while at the same time containing only a limited number of moving parts and a relatively straightforward incident – the Calcutta 2002 shooting at the American Centre.

In contrast the Aftab TCA is significantly more complex. Again, I draw on my participant observation at the Supreme Court stage and the prior judgments and other evidence available to the lawyers drafting the Special Leave Petition to trace actants, their enrolment and associations which result in the stabilisation of Aftab and his associates as terrorist. In contrast to the Nasir TCA this case study relates to a series of six bomb blasts taking place in Mumbai in 1997 and 1998.

Both case studies show how the TCA articulates the chain of reference causing the terrorist facts of the two cases to speak for

themselves. The careful choreography, building on vincula, and other means of making the terrorist speak, brings together modalities of law and modalities of security. However as the judgment moves up the courts and is re-inscribed both the artificiality of the chain of reference and the security elements are increasingly suppressed. At the end stand terrorist facts which speak for themselves, explaining the wide spread agreement on who the terrorists are despite the absence of an agreed definition.

8.2 Assemblage Thinking, Terrorism and Courts

We started on this journey with a number of caveats in mind, perhaps the most important one was that in applying assemblage thinking and inscribing the findings in a text we were making a fixed point against fixity. Inscription lends a temporal transportability to relations that are contingent and predicated on momentary associations in a constantly churning flux. This tension between linear, inscribed and stable text and associations which are ephemeral and constantly performed is inevitable, and it is our obligation as author and as reader to keep in mind that a series of inscribed snapshots of fluid associations are always an irony. Yet this should not deter us from trying to trace these associations and to begin to understand the mechanisms that are taking place when we listen to a judge telling us that a particular incident is terrorism. Unless we unearth these mechanisms and begin to understand them as a continuous preformation of the concept of terrorism through the practices of making terrorist facts we will remain drawn to shallow conclusions and pitched battles over cul-de-sac definitions.

Terrorists are made and stabilised in everyday practices articulated by carefully and laboriously crafted chains of reference, this is why indeterminacy remains at the point of the definition. The legal definitions of terrorism that I have encountered remain vacuous and only subsequently become filled by actants enrolled, articulated and choreographed through hard work. Indeterminacy also remains at the point of the incident which also only subsequently becomes stabilised with actants and, again, hard work. Persons who become

stabilised as terrorists surely most of the time are horrible people, but there are horrible people who are not terrorists and we treat them differently. At some point after an incident one becomes one or the other. This has far reaching consequences – on the flipside this also means that if ‘we’ are playing a role in making some people terrorist and not others (policing the borders of terrorism and by extension the borders of the non-terrorist ‘us’) then something else is disappearing whenever we claim that terrorists are self evident. An act of power is dissimulated.

Throughout this thesis I have attempted to slowly trace associations from a micro perspective. Showing the formation of vincula between insignificant events and a body of texts, the slow, deliberated and hesitant passage of law but also the quick, responsive and prehensile modalities of security. Tuning in to the traces of individual actants left behind in forming associations and circulating in various assemblages. It is time now to return to the much more precarious birds eye perspective by drawing a few tentative conclusions from the mechanisms observed in the two specific TCAs. Assemblages are capable of bringing together actants dispersed both in space and in time but require attention to how this distance is overcome. This usually requires translations but since translations are ubiquitous the affects, the propensities to interact and be interacted with, of a given assemblage are not necessarily limited by territorialising influences such as national borders.

8.3 From India to the Wider World

The case studies are drawn from India. Stabilisations of terrorists through the courts are taking place around the world on a day-to-day basis. Therefore to understand terrorists as made and stabilised in courts, articulated by a crafted chain of reference, has far reaching implications around the world too. The interaction between the stabilised carrier of the idea of terrorism and the wider phenomenon and its response are shaping much of global affairs, domestic policies, legislative activity not to mention the hundreds of thousands of people world wide on whose day to day activity terrorism has a

bearing. Part of my contention is that we cannot adequately deal with terrorism unless we understand how terrorists come into being. As long as we fail to understand that there are precarious and contingent processes of stabilisation just beneath the surface of every stable terrorists, and that hard work is required constantly to keep the tensions from spilling out, we will miss a crucial piece of the puzzle. Either this can result in the wholesale dismissal of the idea of terrorism as an almost conspiratorial tool of global governance.²⁶⁵ Or in the blind acceptance that if we only increase the sophistication of our counter terrorism technologies terrorism can be defeated.²⁶⁶ Neither one of these, admittedly hyperbolic, dismissals of the mechanics of terrorist becoming are an adequate basis for the development of practices which decrease human suffering. Through unpacking the mechanics of terrorist becoming we can identify critical points for intervention. If we fail to understand the ways in which tensions are choreographed through TCAs we risk at best inefficiency in our attempts to alleviate the suffering caused by human perpetrated terrifying incidents. At worst however we risk that attempts and policies aimed at curbing terrorism play a continuous part in its maintenance. In other words, attributing terrorism entirely to individual human agency and understanding it entirely as a product of structure both lead us into a cul-de-sac. Through the TCA we are able to bypass this dichotomy and understand the stabilisation of terrorists as taking place through the relations between actors/actants in a fluid structure. This leads to three important conclusions: First terrorists are not essential categories of the world, they are stabilised through an assemblage of actants. Secondly, these stabilisations are precarious, contingent and laborious drawing on a crafted chain of reference to articulate the terrorist. Thirdly once complete they are stable categories of the world that we need to work with, and the barrier between fact and artefact melts into irrelevance. Except that in

²⁶⁵ For an emphatic defence of this position see (Roy 2004).

²⁶⁶ This drive to make bad ideas work with more sophistication or dedication is traced all the way back to the Vietnam war (Cable 1993).

order to understand some of the paradoxes involved in terrorism we need to bring this stabilisation back into focus. If we want to get out of the bog of definitions of terrorists and vicious fighting over the racialised overtones of counter-terrorism policies and practices we need to unpack the making of terrorists as a process rather than a discovery.

8.4 Implications for Practice and Forward Looking Research

Ultimately let us think about what the conclusion that terrorists are the stabilised products of assemblages means going forward. There are both practical and theoretical implications of the argument made in this thesis. On one hand the theory of the TCA offers itself for further exploration in different contexts. Not only could the toolkit assembled here help to explore the stabilisation of terrorists in contexts other than Indian courts. But it may also offer itself for an exploration of other assemblages ranging from medieval witchcraft trials to the modern corporation. The realisation that much of what we are currently treating as inputs are actually products has far reaching consequences for questioning and re-exploring some of the most puzzling and divisive problems of our times. Questions of how our lives change when we see cornerstone concepts as produced, rather than naturally occurring, require urgent exploration. In the case of terrorists, persons are stabilised as terrorists in courts even in the absence of counter terrorist legislation. Nasir and Aftab become terrorists without the use of specific counter terrorism legislation. More importantly Nasir and Aftab become terrorist through processes, which are better described drawing on registers of choreography and stabilisation than through discovery. The absence of a legal definition or even a consensus of what terrorism is does not stop both Nasir and Aftab to emerge as terrorists out of the court assemblage. This stabilisation shows the large number of actants required and the multitude of diverse processes involved in making a terrorist.

On the other hand we should not close ourselves off from drawing lessons from theoretical understandings by maintaining a separation between theory and practice. If we first and foremost understand theories as processes, which govern our making of causality claims we cannot get away from our thinking being ‘theory’, driven. Understanding the making of terrorists as a multi-layered and complex process allows us to explore purposefully where the most promising avenues for intervention lie. Furthermore it allows us to begin thinking about what influences stabilisations and how we participate in the re-preformation of the terrorist and by extension terrorism. Dismantling the stabilisation of specific terrorists as contingent processes of enrolment and inscription, rather than as the discovery of naturally occurring phenomena encourages us to ask questions about the power relations that are also re-performed and re-inscribed through these processes. Only if we are acutely aware of these implications and underlying assemblages can we design a forward looking research agenda as well as form sound political judgments about appropriate ways to increase overall welfare in light of terrifying violence.

vi. Interviews

Interview Number	Precise Date	Interview Partner Occupation	Field trip
Interview I	04.03.2013	Government Lawyer	I
Interview II	05.03.2013	Senior Political Advisor	I
Interview III	06.03.2013	Government Lawyer	I
Interview IV	08.03.2013	Journalist	I
Interview V	08.03.2013	Lawyer	I
Interview VI	09.03.2013	Prosecutor	I
Interview VII	12.03.2013	Activist/Editor	I
Interview VIII	12.03.2013	High Court Judge	I
Interview IX	15.03.2013	Lawyer	I
Interview X	16.03.2013	Lawyer	I
Interview XI	19.03.2013	Think Tank Fellow	I
Interview XII	19.03.2013	Think Tank Fellow	I
Interview XIII	20.03.2013	Lawyer	I
Interview XIV	21.03.2013	Prosecutor	I
Interview XV	22.03.2013	Lawyer	I

Interview XVI	24.03.2013	Lawyer	I
Interview XVII	30.03.2013	Lawyer	I
Interview XVIII	01.04.2013	Journalist / Activist	I
Interview XIX	02.04.2013	Police Officer	I
Interview XX	03.04.2013	Lawyer	I
Interview XXI	05.04.2013	Employee of an International Human Rights Organisation	I
Interview XXII	09.04.2013	Lawyer	I
Interview XXIII	09.04.2013	Activist	I
Interview XXIV	10.04.2013	Lawyer	I
Interview XXV	12.04.2013	Academic	I
Interview XXVI	15.04.2013	Former Intelligence Community	I
Interview XXVII	17.04.2013	Lawyer	I
Interview XXVIII	18.04.2013	Session's Court / Special Judge	I
Interview XXIX	23.04.2013	Imam	I
Interview XXX	25.04.2013	Former Special Forces	I
Interview XXXI	27.04.2013	Journalist	I
Interview	08.10.2013	Academic/Activist	II

XXXII			
Interview XXXIII	17.10.2013	Lawyer	II
Interview XXXIV	25.10.2013	Lawyer/Politician	II
Interview XXXV	28.10.2013	Journalist/Editor	II
Interview XXXVI	01.11.2013	Prosecutor	II
Interview XXXVII	12.11.2013	Lawyer	II
Interview XXXVIII	14.11.2013	Lawyer	II
Interview XXXIX	14.11.2013	Journalist/Editor	II
Interview XL	15.11.2013	Lawyer	II
Interview XLI	15.11.2013	Lawyer	II
Interview XLII	15.11.2013	Lawyer/Politicians	II
Interview XLIII	16.11.2013	Politician	II

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